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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a proceeding under section 4 of the Natural Gas Act involving a proposed increase in resale rates of Arkansas Louisiana Gas Company where the Federal Energy Regulatory Commission denied the proposed increase in its entirety and ordered an additional rate reduction, the Commission exceeded its statutory authority in ordering the company to make refunds of amounts greater than the proposed increase, thereby requiring a retroactive rate reduction below the level found just and reasonable in the company's previous rate proceeding, contrary to *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

2. Whether the Commission may, through adoption of a regulation pertaining to the filing of purchased gas adjustment rate increases, enlarge the authority delegated to it under sections 4 and 5 of the Natural Gas Act, contrary to *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

LIST OF PARTIES

Public Agencies:

Federal

Federal Energy Regulatory Commission

City

City of Winfield, Kansas

Interstate Natural Gas Pipeline Companies:

Arkansas Louisiana Gas Company, a division of Arkla, Inc.

Northwest Central Pipeline Corporation, formerly Cities Service Gas Company.

List of Petitioner's Parents, Subsidiaries, And Affiliates Pursuant To Rule 28.1:

Arkansas Louisiana Gas Company is a division of Arkla, Inc.

All subsidiaries of Arkla, Inc. are wholly owned.

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No.

ARKANSAS LOUISIANA GAS COMPANY,
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Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Arkansas Louisiana Gas Company a division of Arkla, Inc. ("Arkla") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 14, 1984, in *Arkansas Louisiana Gas Company, a Division of Arkla, Inc. v. Federal Energy Regulatory Commission*, No. 83-1548.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported,[1] and is reproduced at Appendix 3a-6a.[2] An unreported

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[1] Pursuant to Local Rule 13(c) of the rules of the court below, a *per curiam* memorandum was issued which will not be published. In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975), this Court granted certiorari to review an unpublished opinion of the Seventh Circuit, and then, after briefing and argument, reversed.

[2] Together with this petition, Petitioner is filing a separate Appendix which contains the opinions in this matter, including the

order, filed August 8, 1984, denying a timely petition for rehearing is reproduced at App. 7a. The court below affirmed an opinion and order of the Federal Energy Regulatory Commission ("Commission") styled Opinion No. 160, issued on February 4, 1983 (22 F.E.R.C. (CCH) ¶ 61,125) which is reproduced at App. 8a-17a. Opinion No. 160 summarily affirmed an initial decision of an administrative law judge ("ALJ") issued on April 15, 1982 (19 F.E.R.C. (CCH) ¶ 63,008), pertinent portions of which are reproduced at App. 20a-25a.[3] By Opinion No. 160-A, issued April 6, 1983 (23 F.E.R.C. (CCH) ¶ 61,030), the Commission denied Arkla's application for rehearing. That opinion is reproduced at App. 18a-19a.

JURISDICTION

1. The court of appeals affirmed a Commission order requiring Arkla to make a retroactive rate reduction below the level of Arkla's previously determined just and reasonable rate, contrary to sections 4 and 5 of the Natural Gas Act ("Act"), 15 U.S.C. §§ 717c and 717d, as defined in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). The Commission had jurisdiction to review Arkla's rates pursuant to sections 4 and 5 of the Act. Arkla sought court review pursuant to section 19(b) of the Act, 15 U.S.C. § 717r(b).

2. The court of appeals entered judgment on June 14, 1984. (App. 1a-2a). The court of appeals denied rehearing on August 8, 1984. (App. 7a).

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judgment below. The appendix also includes pertinent portions of the statutes and regulations. The Appendix will be referred to as "App.", followed by the appropriate page number.

[3] Petitioner is bringing before this Court for review only one issue out of several arising from a rate increase filing submitted to the Commission. Accordingly, only the portion of the ALJ's lengthy initial decision that deals with this specific issue is reproduced in the Appendix.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

The pertinent portion of section 4(e) of the Act, 15 U.S.C. § 717c(e) reads as follows:

> Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate amounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.[4]

The pertinent portion of section 5(a) of the Act, 15 U.S.C. § 717d(a) reads as follows:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.[5]

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[4] The full text of section 4 is reproduced at App. 26a-28a.

[5] The full text of section 5 is reproduced at App. 28a-29a.

STATEMENT OF THE CASE

1. Factual Background

Petitioner, Arkla, is a natural gas company as defined in the Natural Gas Act by virtue of making sales of natural gas for resale under two rate schedules on file with the Commission. Its principal jurisdictional sale[6] is to Northwest Central Pipeline Corporation under its Rate Schedule No. X-26. Arkla also makes four town border sales for resale in Oklahoma and Kansas under its Rate Schedule No. G-2.

Pursuant to section 4 of the Act and the Commission's regulations thereunder, in April 1980, Arkla tendered for filing with the Commission changes in its Rate Schedules Nos. X-26 and G-2 proposing an increase in annual revenues of approximately $4,000,000.[7] This rate increase was the first general increase proposed by Arkla subsequent to November 1, 1977, the date upon which Arkla's rates were made effective pursuant to Commission Opinion Nos. 71 and 71-A, 10 FERC (CCH) ¶ 61,027 (1980), and 19 FERC (CCH) ¶ 61,012 (1982), respectively. The Commission suspended Arkla's proposed increases in this case for the statutory period of five months so that they became effective, subject to refund, on November 1, 1980.

Arkla's underlying rate, *i.e.*, the rate in effect, not subject to refund, immediately prior to submittal of the rate increase was made up of two components:

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[6] "Jurisdictional sale" is a shorthand expression referring to a sale of natural gas in interstate commerce for resale subject to the Commission's jurisdiction pursuant to section 1(b) of the Act.

[7] The rates under the X-26 and G-2 Rate Schedules are basically the same, the only difference being the measurement pressure base. Accordingly, for purposes of this case, the rates are assumed to be identical.

(1) the base tariff rate that had been approved in the earlier proceedings in Opinion Nos. 71 and 71-A (hereafter Opinion No. 71), and

(2) the cumulative purchased gas adjustments (PGA) that had become effective without refund obligation subsequent to November, 1977, through April, 1980.

Section 154.38(d)(4) of the Commission's regulations, 18 C.F.R. § 154.38(d)(4)(1983),[8] provides that natural gas pipeline companies may file purchased gas cost adjustments (PGA) every six months. These PGA adjustments permit pipelines to pass through to their customers the increases in their own purchased gas costs. In net effect, the PGA adjustments are "wash" transactions permitting the pipelines to pass through changes in purchased gas costs on a relatively current basis. Companies having PGA provisions are required to file new base tariff rates supported by cost of service studies at least once every three years. As permitted by section 154.38(d)(4)(vi)(b), Arkla filed the instant rate increase six months prior to the end of the three-year period following the effective date of the Opinion No. 71 rates. This filing was submitted pursuant to section 154.63 of the Commission's regulations dealing with general rate increases, but it also satisfied the three-year requirement of section 154.38(d)(4)(vi)(a).

The following table sets forth Arkla's base rates under Opinion No. 71, the cumulative PGA adjustments subsequent to November 1, 1977, and the proposed rates under Arkla's G-2 Rate Schedule. The last line of the table shows the effect of the Commission imposed rate in Opinion No. 160. The situation respecting the X-26 Rate Schedule is comparable.

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[8] Section 154.38(d)(4) is reproduced at App. 30a-41a.

G-2 Rate Schedule (in cents per Mcf at 14.73 psia)

Pre-existing (Op. No. 71)[9] Base Rate	Cumulative PGA Adj.	Effective Underlying Rate
78.11	90.62	168.73

Newly Filed Base Rate (exclusive of cumulative PGA adjustment)	Cumulative PGA Adj.	Proposed Rate
87.63	90.62	178.25

Commission Imposed Rate

Revised Base Rate (Exclusive of PGA)	Uncontested PGA	New Base Rate (incl. cumulated PGA)
65.47	90.62	156.09

By its filings at issue here, Arkla sought only to increase its existing base rate of 78.11 cents per Mcf to 87.63 cents per Mcf, or an increase of 9.52 cents per Mcf. The following undisputed facts are significant. Arkla proposed no change in its cumulative PGA adjustment of 90.62 cents per Mcf (R. 129, 147). All the PGA adjustments had been permitted to go into effect without any refund obligation. No issue was raised before the Commission in this proceeding as to the amount or propriety of the PGA adjustments. (R. 15). Neither the ALJ nor the Commission made any finding that the PGA adjustments were excessive, unjust, or unreasonable.[10] Arkla was passing through the total 90.62 cents per Mcf of PGA adjustments paid to its suppliers.[11]

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[9] The figures have not been adjusted to reflect the effect of Opinion No. 71-A, nor the Supreme Court decision in *Public Service Commission of New York v. Mid-Louisiana Gas Co.*, 103 S. Ct. 3024 (1983). Those adjustment result in a slight increase in the base rates but do not affect the issue involved here.

[10] Initial Decision of the Administrative Law Judge, 19 F.E.R.C. at 65,064-66; Opinion No. 160, 22 F.E.R.C. at 61,196; Opinion No. 160-A, 23 F.E.R.C. at 61,074.

[11] *See* section 154.38(d)(4) of the Commission's regulations, 18 C.F.R. § 154.38(d)(4) (1983).

Thus, prior to its increased rate filing, Arkla was collecting 168.73 cents per Mcf without any refund obligation. The proposed increase put at issue the cost justification for the 9.52-cent increase in the base rate for a period from November 1, 1980, to June 1, 1982, when a new rate became effective.[12] In its Opinion No. 160, the Commission required Arkla to refund not only the 9.52-cent increase in the base rate, but also an additional 12.64 cents per Mcf, retroactive to November 1, 1980. The total refund required by the Commission was approximately $12,856,239, exclusive of interest, of which approximately $5,523,077 represents the increase in the base rates sought by Arkla (the 9.52-cent per Mcf increase), and approximately $7,333,161 represents a retroactive rate reduction below Arkla's previously-approved, or "last firm", rate (the 12.64-cent per Mcf reduction).

The issue in this proceeding does not relate to the Commission's authority to order a rate reduction for the future pursuant to section 5(a) or to order refunds of the entire 9.52-cent increase for the period it was collected subject to refund pursuant to section 4(e). The sole issue relates to the Commission's lack of statutory authority to make the 12.64-cent per Mcf rate reduction retroactively effective to November 1, 1980.

2. Proceedings Below

After hearings, an ALJ issued an initial decision in which he recommended disallowance of Arkla's entire increase and a reduction in rate to be made effective retroactively to a level below the previously established rate.

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[12] The period November 1, 1980-June 1, 1982, is considered a "locked-in" period because Arkla's rates changed as of June 1, 1982, and the rate determination in Opinion No. 160 related only to the period when Arkla's 9.52-cent per Mcf rate increase was in effect subject to refund.

(App. 25a).[13] He ordered refunds to effectuate his retroactive rate reduction. (App. 25a).

By Opinion No. 160, the Commission summarily affirmed the ALJ without discussing the retroactive rate reduction issue, stating: (App. 11a)

> On the basis of our review, we conclude that the exceptions raise no issues which are not adequately discussed and disposed of in the initial decision, except as to one matter.[14]

On Arkla's timely application for rehearing, the Commission issued Opinion No. 160-A (App. 18a-19a) in which it denied rehearing and summarily rejected Arkla's contention respecting the illegality of the retroactive rate reduction.

Pursuant to section 19(b) of the Act, 15 U.S.C. § 717r (b), Arkla filed a timely petition for review with the Court of Appeals for the District of Columbia Circuit. There Arkla contended, based upon this Court's opinion in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968), that the Commission has no statutory authority under sections 4 and 5 of the Act to order a retroactive rate reduction below the underlying, last firm rate. Without mention of the statutory limitation or the *Sunray* case, the court held that the Commission, by establishing its PGA regulation,[15] had provided itself with authority to order a retroactive rate reduction below Arkla's last firm rate. (App. 3a-4a). The court denied Arkla's timely petition for rehearing without comment. (App. 7a).

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[13] In his decision, the ALJ did not quantify the amount of the retroactive rate reduction.

[14] The issue which the Commission did discuss is not relevant here.

[15] 18 C.F.R. § 154.38(d)(4).

REASONS FOR GRANTING THE WRIT

This case presents for the first time to this Court the issue whether the Commission can, through promulgation of a regulation governing PGA clauses, enlarge its statutory authority contained in sections 4 and 5 of the Act, thereby providing itself with power to order a retroactive rate reduction below a pipeline's previously established just and reasonable rate. This issue transcends this particular case and will have a substantial effect upon the entire natural gas industry.[16] Not only is the issue novel, but it is of signal importance to the natural-gas industry, involving, as it does, a fundamental question of the Commission's statutory authority under sections 4 and 5 of the Act and its asserted power to enlarge its authority through rulemaking. The issue will reoccur, for it opens the door to possible retroactive rate reductions in all pipeline rate proceedings, despite the well-established principle that the Commission lacks authority to order retroactive rate reductions below the last firm rate, *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984). Moreover, the Commission lacks authority to assume a power, through adoption of a regulation, where that power has been withheld by statute, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). Basically, the decision of the court below conflicts with the recent decision of the Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp. v. FERC*, *supra*. Further, the express language of the PGA regulation does not authorize the Commission's action here.

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[16] Virtually every natural-gas pipeline has a PGA clause in its tariff. *See* § 154.38(d)(4)(iv)(a), App. 32a-34a.

1. The Commission Has No Retroactive Rate Reduction Authority

Although, under section 5 of the Act, the Commission may order a rate reduction to have prospective effect from the date of its final order, there can be no dispute that sections 4 and 5 of the Act give the Commission no authority to order a retroactive rate reduction below the last firm rate. Section 5(a) is explicit. It limits Commission power to a determination of the just and reasonable rate "to be *thereafter* observed and in force." (Emphasis added). Section 4(e) empowers the Commission to order refunds only of "the portion of such increased rates or charges by its decision found not justified." There is simply no statutory provision permitting the Commission to order retroactive reductions for past periods.

Consistent with this statutory scheme, in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968), this Court declared:

> It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase its price, the Commission may not order it to make refunds simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power. It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditional permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e). (Footnote omitted).

391 U.S. at 24.

In the case at hand, the Commission's retroactive rate reduction of 12.64 cents per Mcf left Arkla "with a

smaller net return than if it had never increased its price at all" for the period November 1, 1980, to June 1, 1982.

Early in the administration of the Natural Gas Act, this Court expressed the limitation of Commission power in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), where it stated:

> It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be *thereafter* observed and enforced." § 5(a). (Emphasis added).

320 U.S. at 618.

The validity of this limitation on the Commission's ratemaking authority under the principles of *Sunray* has been recently recognized by the Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp., et al. v. FERC*, 737 F.2d 1208, 1224 (1st Cir. 1984) (DOMAC). The First Circuit stated:

> The Supreme Court has specifically stated that the pre-existing lawful rate provides a refund floor in a Section 4 proceeding. *Federal Power Commission v. Sunray DX Oil Co.*, 391 U.S. 9, 22-25 (1968). It derived this conclusion from the language of the statute and from the fact that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one.
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> * * * *
>
> The Supreme Court's language clearly interprets Section 4's refund authority as limited to the "amounts received by reason of such *increase*." (Emphasis in the original).

DOMAC, like Arkla, had filed for an increase in its tariff rates exclusive of PGA adjustments. The Commission held that DOMAC's rate should be reduced, not increased. But, in contrast to Arkla, the Commission and the court held that the refund power is limited to the

proposed increase, and the reduction below the underlying rate could be made effective prospectively only. DOMAC stands for the proposition, consistent with *Sunray*, that a company may only be required to make refunds of the applied-for increase, and no more. DOMAC's previously filed and accepted uncontested PGA adjustments did not serve as a basis for refunds where the Commission determined that the company's costs, exclusive of PGA adjustments, had been reduced. In contrast, in the case at hand, the Commission would retroactively reduce Arkla's rate by 12.64 cents per Mcf below the underlying rate. In net effect, the reduction would derive from the uncontested PGA adjustments.

The only mention by the Commission of the retroactive rate reduction issue in the case below occurs in its order denying Arkla's application for rehearing, where the Commission referred to its decision in *Florida Gas Co.*, 19 F.E.R.C. (CCH) ¶ 61,293 (1982).[17] The Commission noted that the applicable regulations "are designed to incorporate a balancing of the pipeline's total jurisdictional costs and revenues at the time a 36-month filing is made." (App. 19a). But this language is irrelevant to the precise issue here. Even assuming that the triennial filing offers the opportunity to match costs and revenues, that process enables the Commission to determine the justification for any proposed increase and to fix rates for the future, but it has nothing to do with the absence of statu-

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[17] Affirmed in *Florida Gas Transmission Co. v. FERC*, No. 82-6041 (11th Cir., Sept. 17, 1984). The company had submitted a triennial rate filing under section 154.38(d)(4) restating its resale rate but suggesting no change in its PGA adjustments or in its separate transportation rate. Florida Gas and interested parties reached a settlement as to the resale rate level. The Commission held that the transportation rate should be reduced. Florida Gas contended that the transportation rate was not part of the base tariff rate and was not involved in the proceeding. In affirming the Commission's decision that the transportation rate was part of the base tariff rate, the court did not reach the precise issue involved here.

tory authority to order a retroactive rate reduction after the Commission has completed the balancing. As this Court stated in *Sunray*, 391 U.S. at 22, there is a floor below which the Commission may not order refunds under section 4(e) of the Act. Yet, the court below echoed the Commission's theme stating, "FERC in promulgating the PGA clause did not give up its authority to review the entire rate structure of a pipeline every three years." (App. 4a). Again, the court below missed the essential issue for although the Commission has authority to review the rate structure every three years, its authority to order a retroactive rate reduction below the previously established rate is nonetheless limited by the restrictions of sections 4 and 5.

2. The Commission Lacks Authority to Grant Itself Power Withheld by Statute

Despite the straightforward prohibition of a retroactive rate reduction authority, both the Commission and the court below, without even mention of *Sunray* or any attempted distinction, relied on the PGA regulation [18] as authorizing the Commission to nullify the limitation of sections 4 and 5 of the Act. There is nothing in the language of the PGA regulation expressly authorizing such action, and even if the language could be so construed, the Commission may not, through issuance of a regulation, arrogate to itself authority that is forbidden to it by the statute, *Ernst and Ernst v. Hochfelder*, 425 U.S. 185 (1976). In that case, this Court stated:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." [19]

425 U.S. at 213-214.

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[18] 18 C.F.R. § 154.38(d)(4). *See* App. 30a-41a.

[19] To the same effect, *see Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1148-49 (D.C. Cir. 1980); *National Assoc. of Regula-*

Note, this case does not involve a question where a company has agreed to forego the exercise of a *right* provided under the Act in order to take advantage of a streamlined filing procedure. The PGA regulation relied upon by the Commission is of an entirely different character pursuant to which the Commission claims to be invested with a *power* not provided by the Act. Even if a company were to agree to forego the exercise of a right, it cannot, by agreement or otherwise, invest the Commission with a power not granted by the Act. A company might agree to a rate moratorium postponing the date for a new rate filing, but it cannot agree, for example, that the Commission can regulate its direct sale rates. Section 1(b) of the Act simply does not delegate that authority to the Commission. By the same token, sections 4 and 5 do not delegate to the Commission authority to order retroactive rate reductions. The Commission's attempt to assert such authority through a regulation is invalid.

It is in this context that the Commission's action must be measured. The facts demonstrate that all of Arkla's purchased gas cost increases from November 1977, through April 1980 had become effective without suspension or refund obligation and no party raised any issue respecting Arkla's PGA adjustments. (R. 15).[20] The Commission made no finding that the PGA adjustments

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tory Utility Commissioners v. FCC, 533 F.2d 601, 617 (D.C. Cir. 1976).

[20] When the Commission believes that a PGA adjustment filing may be unjust and unreasonable, it suspends such filing. When a suspended filing later becomes effective, it is made subject to refund. *See, e.g., East Tennessee Natural Gas Co.*, 27 F.E.R.C. (CCH) ¶ 61,480 (1984); *Midwestern Gas Transmission Co.*, 27 F.E.R.C. (CCH) ¶ 61,481 (1984); *Northwest Pipeline Corp.*, 26 F.E.R.C. (CCH) ¶ 61,417 (1984); *El Paso Natural Gas Co.*, 26 F.E.R.C. (CCH) ¶ 61,423 (1984); *Montana-Dakota Utilities Co.*, 23 F.E.R.C. (CCH) ¶ 61,162 (1983).

were unjust, unreasonable, or unlawful.[21] There is no dispute that Arkla paid the total of 90.62 cents per Mcf of PGA adjustments to its suppliers of natural gas, so that this amount is not available for refunds. Arkla's semi-annual PGA adjustments were fully reviewed by the Commission when they were filed to verify the only cost involved—the purchased gas cost increases. Had there been any question as to these costs the Commission could have suspended them and allowed them to go into effect subject to refund as provided in section 4(e) of the Act. But the Commission did not take that action. As a consequence, the PGA increases became final filed rates reflecting the just and reasonable rates by Arkla's suppliers. As such, neither the Commission nor a court may authorize a retroactive reduction. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981), this Court affirmed the "filed rate doctrine," stating:

> These straightforward principles underlie the "filed rate doctrine", which forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.
>
> * * * *
>
> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." . . . This rule bars "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." (Citations omitted). (Emphasis in the original).

Nevertheless, the Commission held that through application of section 154.38(d)(4)(vi) of its regulations it gained a power otherwise denied to it, namely, to order a

---

[21] *See* Opinion Nos. 160 and 160-A (App. 8a-19a).

retroactive reduction below the previously established rate level of 168.73 cents per Mcf. In so holding, the Commission would clothe itself with a power denied it by the Act.

3. The Language of the Commission's Regulation Does Not Authorize the Commission's Action Here

The language of the PGA regulation, section 154.38 (d) (4), confirms the view that the Commission did not, in fact, give itself the wide-ranging authority that it asserted in this case. Instead, the language of the regulation restricts the Commission's authority to the ordering of refunds at the termination of the 36-month period only where a change goes into effect subject to refund and only of that portion of the change found unjust and unreasonable. Properly construed, the regulation complies with the statutory standard.

Subsection 154.38(d) (4) (vi) (*c*) defines the limit or the refund floor.[22] Applied to this case, there is no question that Arkla's 9.52-cent increase was subject to refund as of November 1, 1980, and the subsection provides for nothing more. That subsection is not a source of authority to order a retroactive rate reduction in excess of the 9.52-cent increase. It provides, in pertinent part:

> (c) If . . . it is found based on the aforementioned [cost of service] study, that the jurisdictional cost of service is less than the jurisdictional revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or

---

[22] Subsection 154.38(d) (4) (vi) (*a*), which states that a triennial filing shall be subject to refund merely restates the statutory provision of section 4(e). Further, Arkla made its rate filing pursuant to section 154.63 as provided for by subsection 154.38(d) (4) (vi) (*b*). More importantly, subsection 154.38(d) (4) (vi) (*c*) is the provision that prescribes the extent or floor for refunds, the precise issue here.

> determined, and shall refund to its jurisdictional customers *any excess amounts collected subject to refund* to the date of billing under the revised tariff sheets, with interest to that date. *This refund obligation* shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate. (Emphasis added).

Applying the language of this subsection to the facts of this proceeding, the only amount collected subject to refund was the 9.52 cents per Mcf increase above the existing base rate. The limitation "This refund obligation" contained in the last sentence of the subsection must be read in the context of the previous sentence which provides that refunds shall be made of "any excess amounts collected *subject to refund.*" (Emphasis added). In short, the Commission's PGA regulation, when properly read in the context of the Commission's limited power under sections 4 and 5 of the Act, does not authorize the Commission to expand its authority in derogation of *Sunray.* The Commission's contrary interpretation is in error.

CONCLUSION

This case presents the clearcut, novel issue whether the Commission can, through promulgating a PGA regulation, circumvent this Court's unambiguous holding in *Sunray* that sections 4 and 5 of the Natural Gas Act prohibit retroactive rate reductions below the previously established rate. Inasmuch as all pipeline companies have PGA clauses in their tariffs, the issue is important for the industry as a whole, and certainly will reoccur. The inconsistent treatment afforded by the decision of the court below when contrasted with the result in the First Circuit in *Distrigas of Massachusetts Corp. v. FERC, supra,* requires resolution by this Court.

For the foregoing reasons, a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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Dated at Washington, D.C. this 6th day of November, 1984.

84-716

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1548

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CITY OF WINFIELD, KANSAS,
Intervenor

[Filed Jun. 14, 1984]

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: MIKVA and BORK, *Circuit Judges*, and BAZELON, *Senior Circuit Judge.*

JUDGMENT

This cause came on to be heard on a petition for review of orders issued by the Federal Energy Regulatory Commission, and was briefed and argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). For the reasons stated in the accompanuy memorandum, it is

ORDERED and ADJUDGED, by this Court, that the orders under review are affirmed and the petition for review is denied. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Per Curiam: Petitioner, the Arkansas Louisiana Gas Company, seeks review of orders of the Federal Energy Regulatory Commission (FERC or Commission) which require petitioner to refund excess rate charges to its customers. FERC's orders were based on the decision of an Administrative Law Judge (ALJ) which was made after a full hearing on the matters in issue. We uphold FERC in all respects.

Petitioner's main complaint is that FERC imposed an improper retroactive refund liability by using the rate set in a 1977 filing as the floor on petitioner's refund liability, rather than using that rate as adjusted by several other subsequent filings. Under streamlined procedures authorized by Commission regulation, a pipeline such as petitiioner may adjust its rates every six months by making a limited filing with FERC which reflects only changes in the pipeline's cost of purchased gas. The regulation which allows these Purchased Gas Adjustment filings (the PGA clause) requires as a quid pro quo a filing at least once every three years in which the pipeline provides a full cost-of-service study. Pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) (1982), FERC at the time of Arkla's triennial filing in 1980 suspended the rate increase for five months and then allowed it to go into effect subject to refund pending the outcome of a full hearing. At this hearing, FERC found the 1980 rates unreasonable and ordered a refund; that refund took as its baseline the 1977 rates rather than those rates as adjusted by the subsequent PGA filings.

We can find no fault with FERC's interpretation and application of the PGA clause to the facts at hand. The interim streamlined filings by petitioner do not establish a new base rate below which refunds may not be ordered, for those rates are not subject to full FERC review until the triennial filing. Accordingly, it was proper for FERC to go back to the earlier 1977 base rate in fixing the floor

on petitioner's refund liabilities. Petitioner seems to be arguing that the increased cost of purchased gas during the interim periods must be taken as a "given" so that the rate after the most recent PGA establishes an absolute floor below which FERC may not order a refund. However given these purchased gas costs might be, FERC in promulgating the PGA clause did not give up its authority to review the entire rate structure of a pipeline every three years. While the cost of purchased gas may have gone up, other costs may have gone down. In any event, it is for FERC to set the rates; the only limitation on the size of an ordered refund is the requirement that it not lead to a rate lower than the last rate that FERC has fully approved—in this case the rate set in 1977.

Petitioner also complains that FERC failed to adjust petitioner's rate of return on equity to a level higher than was set in the 1977 decision. It is beyond challenge that a strong presumption of validity "attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake" a heavy burden. *Permian Basis Area Rate Cases*, 390 U.S. 747, 767 (1968). At the Commission level, the burden for seeking a change from the earlier approved rate of return on equity was also petitioner's. Petitioner tried to meet this burden by introducing earnings figures of 14 other pipelines. FERC properly refused to credit this evidence because the figures represented a mix of business and risks that made any comparison misleading. FERC's refusal to credit virtually identical evidence was upheld by the Fifth Circuit in an earlier review sought by petitioner, *Arkansas Louisiana Gas Co. v. FERC*, 654 F.2d 435 (5th Cir. 1981). Moreover, petitioner's attempt to respond to the Fifth Circuit's decision by submitting further comparative earnings studies was infected with the same flaw: the comparisons were with businesses insufficiently similar to that of petitioner. The Commis-

sion was therefore correct to find that petitioner had not met its burden of justifying a higher rate of return on equity than that set by FERC's order.

Petitioner also challenges FERC's exclusion of undistributed subsidiary earnings from the rate base and simultaneous inclusion of the subsidiaries' debt. These determinations, originally made by the ALJ and affirmed by FERC, are in keeping with accepted Commission policy and logic. Petitioner offers no reasons why these routine allocations were not proper in this case. Moreover, it is to FERC that Congress delegated the responsibility for developing procedures to resolve these complex issues of return on equity and appropriate capital structure. Decisions by FERC in these areas are entitled to special deference by a reviewing court.

Petitioner next complains that FERC excluded from the rate base any allocation of assets attributable to a new facility known as Chiles Domes. Only facilities that are "used and useful" are included in a company's rate base. Petitioner claimed that its Chile Domes facility should have been included because some gas had been injected by the relevant date, thus making the facility "used and useful." FERC determined that the only gas inserted into the facility by the appropriate date was "cushion gas", which is gas not available for sale to customers. Until "storage gas" was injected into the facility, the facility was not, according to FERC, available for its intended purpose. The expertise of FERC as to when a facility becomes useful, when dependent on such technical determination as the allocation of gas into "cushion gas" and "storage gas," should not be tampered with on judicial review.

Finally, petitioner contends that FERC improperly deducted funds from the rate base which reflected deferred taxes for years prior to 1975. Petitioner uses tax normalization, which allows a utility to obtain more from

ratepayers to meet tax liabilities in a given year than is actually paid in taxes for that year. FERC required petitioner to account for this difference so that the balance sheet did not reflect any distortion caused by the mismatch between taxes collected and taxes paid. FERC was correct in requiring the adjustment necessary to account for what is essentially a deferred tax liability.

The orders of the Commission are affirmed and the petition for review is denied.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1983

No. 83-1548

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

CITY OF WINFIELD, KANSAS,
Intervenor

[Filed Aug. 8, 1984]

Before: MIKVA and BORK, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*

ORDER

On consideration of Petitioner's Petition for Rehearing, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam
For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP80-91-000
and RP80-93-000

ARKANSAS-LOUISIANA GAS COMPANY

OPINION NO. 160

OPINION AND ORDER ESTABLISHING
JUST AND REASONABLE RATES

Issued February 4, 1983 DC-B-43

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP80-91-000
and RP80-93-000

OPINION NO. 160

APPEARANCES

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James Leithhead, Alfred O. Holl and *Hervey M. Cody* for Cities Service Gas Company

Stanley W. Balis and *William T. Miller* for the Cities of Winfield, Kansas and Mangum, Oklahoma

Jay M. Galt for the City of Mangum, Oklahoma

Richard Bonnifield for the Staff of the Federal Energy Regulatory Commission

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler III, Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

Docket Nos. RP80-91-000
and RP80-93-000

ARKANSAS-LOUISIANA GAS COMPANY

OPINION NO. 160

OPINION AND ORDER ESTABLISHING JUST AND REASONABLE RATES

(Issued February 4, 1983)

This proceeding concerns the Arkansas-Louisiana Gas Company's request, pursuant to section 4 of the Natural Gas Act (NGA), 15 U.S.C. § 717c, for an increase in its rates for sales of gas within the Commission's jurisdiction to certain customers. The proposed rates, after being suspended for five months, were in effect, subject to refund, from November 1, 1980, until June 1, 1982.[1] The Company's request, if approved without modification, is for an annual increase in rates of roughly $4 million. The Company's sales which are subject to the Commission's jurisdiction are to Cities Service Gas Company and to certain small towns in Kansas and Oklahoma.

---

[1] The Company's filings in the instant proceeding were accepted by the Commission on May 30, 1980, 11 FERC ¶ 61,213. The Commission accepted on May 26, 1982, 19 FERC ¶ 61,194, subsequent rate filings, with the rates effective subject to refund on June 1, 1982.

Following hearings, the presiding administrative law judge issued an initial decision which disposed of a number of issues raised by the Company's request, and determined just and reasonable rates.[2] The Company (also referred to herein as Arkla) filed exceptions to various parts of the initial decision. The Commission staff and the City of Winfield, Kansas, filed briefs opposing the Company's exceptions.

We have reviewed the initial decision, the briefs on exceptions, and the record in this proceedng. On the basis of our review, we conclude that the exceptions raise no issues which are not adequately discussed and disposed of in the initial decision, except as to one matter. On that issue, the appropriate data to be relied on in considering a rate increase application, we have amplified the initial decision. We therefore affirm and adopt the initial decision, as modified herein.

The Test Year Data

Under the NGA regulations, a pipeline seeking a rate increase is required to file data consisting of exhibits and testimony in support of its request. The purpose of the data is to sustain the burden of proof which is on the Company to establish that its proposed rates are just and reasonable.

Section 154.63(e)(2) of the regulations provides that the data should be based on a test period consisting of a base period of 12 months, and an adjustment period of nine months immediately succeeding the base period. The regulation states that the test period:

> [S]hall consist of a base period of 12 consecutive months of most recent available actual experience *adjusted for changes* in revenues and costs *which are known and measurable* with reasonable accuracy

[2] The initial decision was issued on April 15, 1982, 19 FERC ¶ 63,008.

> *at the time of filing*, and which will become effective within nine months after the [base period.] [Emphasis added].

Under this scheme, adjustments are to be made to the base period data. The adjustments are to reflect changes effective within nine months after the base period which are known and measurable. However, there is a point in time at which the adjustments are theoretically to be applied. This point in time is the date the rate increase is filed.

The reason for having such a point of time is to deal with the problem of a "moving target." That is, as time passes after the filing, new data are constantly becoming available which could form the basis for revised estimates. The orderly and efficient administration of rate regulation requires some limit on the use of new data. A new rate proceeding can be instituted if necessary to compensate for changes occurring subsequent to the adjustment cut-off.

In this case, the filing date was April 28, 1980. The adjustment period ended on September 30, 1980. The judge used actual data (referred to as "actuals") for the *entire* nine month adjustment period. The Company argues that the judge erred in using data which were available after the filing date.

The judge justified his decision to use "actuals" (I.D., pp. 7-10), as follows:

(1) The FPC, in an analogous 1959 case, affirmed the use of actuals. *Michigan Wisconsin Pipe Line Co.*, 21 FPC 306. In that decision, the Commission stressed the discretionary nature of such a determination. The Commission stated:

> [A] hearing officer should receive any and all evidence which will enable this regulatory agency to arrive at the most nearly reasonable result. This evidence should be confined to the test year as originally cast in the rate filing but if it appears that

> the ends of justice will be served by the consideration of dependable data which would affect the rate level materially and which relates to a period of time beyond the filed test year, that data should be available to the Commission for its consideration. It is realized, of course, that the eleventh hour receipt of evidence which goes beyond the original test year on which the Staff and interveners have relied in their study of a case and preparation therefore is disruptive and may, in some instances, render useless hours of effort previously expended. * * * In determining whether to receive and consider evidence relating to events occurring beyond the filed test period, the hearing officer must weigh all of the advantages and disadvantages, the benefits and the detriments which would arise from either course of action. [*Id.*, 316.]

The judge also referenced FPC Opinion No. 703 (1974), in which the use of actuals was accepted.[3]

(2) The decision in *Indiana Municipal Electric Association* v. *FERC*, 629 F.2d 480 (7th Cir. 1980), relied on by the Company in challenging the use of actuals, does not prohibit their use.[4]

(3) The Company has not alleged that the use of actuals was the result of delaying tactics of the staff or

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[3] There the Commission's discussion was of a summary nature, with the Commission simply opining that "there is no reason why [the use of actuals] is not acceptable where the data is available." *Consolidated Gas Supply Corp.*, 52 FPC 454, 458.

[4] The judge noted that in the *Indiana Municipal* decision the Court rejected the argument that the Commission was *required* to use actuals if they were available. We note further that *Indiana Municipal* concerned the quite distinct test year scheme provided for under the Federal Power Act (FPA) regulations. Under the FPA regulations, actual would replace future year *estimates*; under the NGA regulations, they would replace changes in costs and revenues *known and measurable* at the time of filing.

intervenors[5]; nor has the Company argued that the actuals are atypical or give distorted results.[6] Finally, the use of actuals in this situation "would be more advantageous to the proper and orderly determination of just and reasonable rates in this case." (I.D. 10.)

The Company argues that the Commission is strictly bound by the requirements of the regulations. In support of this contention the Company cites the D.C. Circuit's recent *Panhandle Eastern* decision,[7] which stated:

> [W]e do not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation . . . . [Footnote omitted.]

Discussion

We are of the view that the use of actuals is appropriate in this case. Moreover, we believe that the cases cited by the judge support the discretionary use of actuals. However, neither the initial decision nor the two Commission decisions cited by the judge which have used actuals specifically attempted to reconcile the use of actuals with the Commission's regulations. We believe that further discussions is desirable to that end.

The peculiar situation here is that no party has used a cost-of-service study which conforms to the regulations

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[5] The delay was owing to protracted, and ultimately unsuccessful, settlement negotiations. (I.D. 3-5.)

[6] In addition, the judge suggests that the Company acquiesced in the use of actuals during the hearing. (I.D. 10.) However, we do not believe that this is an accurate reflection of the Company's position. See Arkla's Motion to Quash Subpoenas, filed Feb. 2, 1981.

[7] *Panhandle Eastern Pipe Line Co.* v. *FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980).

governing filing requirements. The staff and the City wish to base adjustments on changes known and measurable at the conclusion of the test period, rather than at the time of Arkla's filing. Arkla argues that because these actuals go beyond the adjustment cut-off, they cannot be used. For its part, however, Arkla declined to make adjustments to the base period for known and measurable changes, even though it was aware of such changes as of the date of filing.[8]

The concern of the regulation is to arrive at a just and reasonable rate rooted in base period cost-of-service data, *as adjusted* for the annual effect of changes known and measurable at the time of filing. Clearly, the best way of arriving at such a determination would be to adjust the base period data on the basis of information available at the time of filing.

The Company could have made adjustments to the base period to reflect appropriately changes known and measurable as of the date of filing. If it had done so, its claimed test period costs could have served as the point of departure for establishing just and reasonable rates. The Company failed to do so, however. The staff, similarly, did not attempt to construct an adjusted test period on the basis of only data available on the date of filing. Instead the staff used actuals for the entire nine-month adjustment period as the basis for its adjustment.

The question we face, as a consequence, is which position, that of the staff or that of the Company, provides the better representation of the changes which were

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[8] The most striking illustration of Arkla's position concerns products extraction plant revenues. On January 1, 1980, the day after the conclusion of the base period, natural gas liquids were deregulated. Yet Arkla did not make any adjustment to reflect the likely resultant increase in revenues, even though such an increase was known and measurable long before the adjustment cut-off date. (I.D. 29.)

known and measurable at the time of filing, and thus serves best as a basis for determining rates for the period commencing November 1, 1980.

The staff's actuals were relied on by the judge in dealing with three issues.[9] The judge found as to these issues that the adjustments based on actuals were representative of test period changes, and not abnormal. He found further that Arkla made no claim to the contrary. The record indicates, moreover, that there were significant changes during the nine-month adjustment period which were pertinent to these issues, and which justified making adjustments.

We therefore conclude that the staff's position is a better representation of Arkla's cost-of-service and jurisdictional revenue requirements for the purpose of establishing rates in this proceeding. And it is in accord with the concern of the regulation, as described above. For this reason we affirm the initial decision's adjustments to the base period data.

We emphasize that it is because of the facts present in this case that the discretionary use of the post-filing date actuals is prescribed here. In a properly presented case, in which base period data were adjusted for changes known and measurable at the time of filing, the use of such adjusted test-period data would generally be more appropriate. This does not mean, however, that the Commission would discourage the submission of actuals for a "locked-in period" as has often been done in the past. For in any proceeding in these matters, we reiterate, the Commisson's essental concern is that the applicant's rates be premised upon a representative and credible cost-of-service determination.

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[9] These were products extraction plant revenues (I.D. 29); plant in rate base (I.D., pp. 30-35); and delivery volumes, for rate design and allocation purposes (I.D., pp. 63-64).

The Commission orders:

(A) The initial decision issued in this proceeding on April 15, 1982, is affirmed and adopted as modified herein. Any exceptions to the initial decision not granted herein are denied.

(B) Within 75 days of the date of issuance of this order, the Arkansas-Louisiana Gas Company shall file a revised cost-of-service and any necessary amendments to its rate schedules or tariffs, in lieu of those at issue herein, in accordance with the findings and conclusions of this decision and with the Commission's Rules and Regulations. However, if applications for rehearing are pending at the close of the 75 day period, the above-mentioned filing shall be made 30 days from the date the applications for rehearing are disposed of by the Commission.

(C) Within 30 days of the Commission's approval of the revised tariff sheets, Arkansas-Louisiana shall refund to its customers, with interest, any amounts collected in excess of those allowed herein.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman;
J. David Hughes, A. G. Sousa and Oliver G. Richard III.

Docket No. RP80-91-002
and RP80-93-002

ARKANSAS LOUISIANA GAS COMPANY
(a Division or Arkla, Inc.)

OPINION NO. 160-A

ORDER DENYING REHEARING

(Issued April 6, 1983)

On March 7, 1983, the Arkansas Louisiana Gas Company (Arkla) filed a request for rehearing of Opinion No. 160, 22 FERC ¶ 61,125 (February 4, 1983). In Opinion No. 160 the Commission affirmed and modified an initial decision, and established just and reasonable rates for Arkla's sales of gas within the Commission's jurisdiction to certain customers.

Arkla's petition for rehearing argues that the Commission erred in several respects in its opinion. For the most part, Arkla's petition repeats arguments which were disposed of by Opinion No. 160. The petition for rehearing raises no maters warranting departure from our prior decision. However, one point that Arkla's petition raises merits mention.

The Company's petition for rehearing reiterates the argument which the judge rejected that it can not be required to make refunds below the last Base Tariff

Rate[1] for the period prior to the Commission's final determination in this proceeding.[2] We note that the Commission considered this question after the initial decision was issued. The Commission's decision, *Florida Gas Co.*, 19 FERC ¶ 61,293 (1982), supports the judge's conclusion.[3]

The Commission Orders:

(A) Arkla's March 7, 1983, petition for rehearing is denied.

(B) Arkla's Motion for Oral Argument, filed the same day, is also denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

---

[1] See Opinion No. 71-A, 19 FERC ¶ 61,012.

[2] In its petition the Company argues that the judge cited the regulation erroneously. The regulation provides that the refund obligation:

> shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective *from the date of the Commission's final order* determining a new Base Tariff Rate. [Emphasis added.]

The judge incorrectly quoted the regulation as providing that refund liability is prospective "from the date on which a cost of [service] study is filed." This error does not affect the judge's reasoning, however, This is because the judge concluded that the reductions were not below the old Base Tariff Rate.

[3] The Commission stated that the applicable regulations "are designed to incorporate a balancing of the pipeline's *total jurisdictional costs and revenues* at the time a 36-month filing is made." [Emphasis added.]

19 F.E.R.C. (CCH) ¶ 63,008

ARKANSAS-LOUISIANA GAS COMPANY

Docket Nos. RP80-91-000 and RP80-93-000

Initial Decision of the Administrative Law Judge

(Issued April 15, 1982)

George P. Lewnes,
Presiding Administrative Law Judge

* * * *

G. Refund Issue

The issue presented here is whether, under the facts of this case, Arkla's refund liability is limited only by its prior "old" Base Tariff Rate rather than, by that rate as adjusted for interim purchased gas adjustment (PGA) clause increases. Arkla argues for the latter approach, whereas Cities and the Staff support the former.

At the prehearing conference of February 10, 1981, Judge Charno ruled that, based on the Commission's regulations and orders, Arkla's refund liability is limited only by the prior Base Tariff Rate, rather than by that rate as adjusted for subsequent purchased gas cost increases. (Tr. 104) On April 1, 1981, Judge Charno certified his ruling to the Commission, together with the then-proposed settlement submitted by Arkla and opposed by the Staff. In its order of July 17, 1981, rejecting the offer of settlement and remanding this proceeding for full evidentiary hearings, the Commission stated:

> We do not now decide the refund issue, but we are unwilling to accept, for purposes of settlement, Arkla's interpretation of the Commission's refund authority. Furthermore, there is no doubt that the Commission has authority to reduce Arkla's rates

> prospectively below the pre-filing level if that is found to be necessary.

(Mimeo at 2)

At the prehearing conference of July 22, 1981, the undersigned stated that, because of the importance of this issue, the parties would be permitted to reargue it *de novo* on brief. Upon review of those arguments, thoroughly presented on brief by all parties, the Presiding Judge Charno's prior ruling on this issue. It is indelibly inscribed in the Commission's published pronouncements that PGA procedures were not implemented by the Commission as a means by which jurisdictional pipelines could avoid the full measure of regulatory scrutiny of their rates mandated by the Natural Gas Act.

Until 1972, a natural gas pipeline company was required to make a rate increase filing under Section 4 of the Act in order to obtain a rate increase that reflected changes in purchased gas costs. In Order No. 452, the Commission authorized pipelines to include in their tariffs PGA clauses that would provide the basis for automatic rate adjustments to reflect increases in the unit cost of purchased gas. (47 FPC 1049) In doing so, the Commission addressed the administrative problems involved in requiring a full scale rate case each time a rate increase became necessary due to increased supplier costs:

> It is desireable to curb the frequency of general rate increase applications because of resulting administrative delays in the final determination of rates for all companies. The inclusion of a PGA clause in pipeline companies' tariffs would permit pipeline companies to protect themselves against supplier rates increases without frequent general rate increase applications, would make purchased gas adjustments available to all pipeline companies, and would make adjustments available for more than a temporary period of time. . . . Also, our action

> herein should help prevent a backlog of "pancaked" rate filings which cause prolonged delays in the final determination of proper rate levels and frustrate the administrative process.

(*Id.* at 1050)

While recognizing the benefits accruing to the pipelines from this new regulatory approach, the Commission was also mindful of its obligations to the ultimate consumers:

> The ratepayer is protected under our new rule since it requires companies to automatically reduce rates to reflect purchased gas decreases and provides for periodic review and investigation into the companies' total cost of service.

(*Id.* at 1050-51)

Order No. 452 amended portions of Section 154.38 of the Commission's regulations relating to PGA filings. These regulations provide that, before a pipeline company can have a PGA clause in its filed tariff, it must show that its total costs and revenues are in balance. To maintain its PGA clause, and provide a basis for detection of possible cost-revenue imbalances, the regulations further require that pipeline companies with a PGA clause must file a cost of service study and new base tariff rates at the end of thirty-six months after establishment of the base rates. When that filing is made, the company agrees that its filing "will automatically be subject to refund." *See* 18 CFR § 154.38(d)(4)(vi)(a)(1981).

It is clear from Order No. 452 that the Commission's intention in creating Section 154.38(d) was to avoid adding to an ever-growing backlog of rate cases by allowing automatic purchased gas adjustments. These adjustments were intended to be conditioned on the results of a review of a company's entire cost of service every

thirty-six months in a full-fledged Section 4(e) rate case. The intent was never to permanently reduce the degree of scrutiny to which these filings were to be subjected. There was to be an assessment of accountability, *i.e.*, refunds, at the end of the thirty-six months.

So as to dissipate any remaining confusion as to the applicable refund floor under these PGA regulations, the Commission issued Order No. 452-A:

> It should be noted that *the refund floor is the old Base Tariff Rate and is not the last effective rate* (*i.e.*, the last Rate After Current Adjustment). This refund floor minimizes the possibility that companies will be able to retain revenues in excess of their cost of service and permits the extent of potential liability for refunds to be known. *The potential refund liability is prospective from the date on which a cost of study is filed, i.e.*, after termination of the 36-month period. [Emphasis supplied]

(47 FPC 1510, 1511 (1972))

In summary, pipeline companies making PGA filings were placed on notice that acceptance of such filings was not meant to be a final approval of the rate increases they contain. Rather, PGA clauses were and are a divergence from the usual ratemaking procedures, and are allowed only as a stop gap procedures, and are allowed only as a stop gap measure to alleviate administrative backlog and to protect pipelines against supplier rate increases without frequent general rate increase applications." A rate case proceeding examines all of the circumstances involved in a company's cost of service to determine whether the rate requested is just and reasonable. This ensures a balance between any increases and decreases which have occurred in a company's total costs. A PGA increase filing considers only one isolated element of a gas company's expenses, without regard to whether the unit cost of rendering service has increased.

Arkla's filing, in this proceeding, included revised tariff sheets restating Arkla's Base Tariff Rate to establish a new Base Tariff Rate, pursuant to the requirements of Section 154.38(d)(4)(vi) of the Commission's regulations. *See* p. 3 herein. Its thirty-six month date of accountability has arrived and its refund obligation is limited only by its prior old Base Tariff Rate.

Ultimate Findings and Conclusion

Upon consideration of the evidentiary record and all of the pleadings in this proceeding, it is further found and concluded that:

(1) Arkansas Louisiana Gas Company is a natural gas company within the meaning of the Natural Gas Act.

(2) The proposed increase in rates and charges and the proposed changes in tariff, filed in Docket Nos. RP80-91 and RP80-93, involve sales for resale in interstate commerce and are subject to the jurisdiction of the Federal Energy Regulatory Commission.

(3) The changes in rates and charges and the tariff provisions affecting such rates and charges, proposed herein by Arkansas Louisiana, have not been shown to be just and reasonable; they are, therefore, found to be excessive.

(4) The just and reasonable rates and charges and the tariff provisions affecting such rates and charges are and will be those which are in conformity with the views, findings and conclusions set forth in the decision herein.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on exceptions or on its own motion, that:

Within thirty (30) days from the issuance of this decision, Arkansas Louisiana shall file revised rates and revised tariff sheets in accordance with the findings and conclusions of this decision; *and, further,* Arkansas Louisiana shall refund to its customers all amounts collected in excess of those rates which would have been payable under the revised rates and charges ordered above, together with interest from the data of payment to the date of refund, at the interest rate prescribed by the Commission's regulations. The floors, for purposes of calculating refunds, shall be the old Base Tariff Rates under the G-2 and X-26 rate schedules, without adjustment for subsequent PGA increases.

/s/ George P. Lewnes
GEORGE P. LEWNES
Presiding Administrative
Law Judge

Natural Gas Act

Rates and Charges; Schedules; Suspension of New Rates

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except

after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the

Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Fixing Rate and Charges; Determination of Cost of Production or Transportation

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission

may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * * *

18 C.F.R. § 154.38(d)(4) (1983)

* * * *

(4) A natural gas pipeline company may flow through changes in its cost of purchased gas[1] pursuant to a purchased gas adjustment clause (PGA clause). The proposed clause must be filed with the Commission and shall not be effective until approved by the Commission. No request for approval of a PGA clause will be considered unless the proposed clause meets the terms and conditions specified in paragraphs (d)(4)(i) through (viii) of this section. Any PGA clause approved by the Commission is subject to the conditions in paragraph (d)(4)(ix) of this section.

The first PGA rate adjustment to become effective on or after January 1, 1979, may reflect the calculation specified in clause (x).

(i) The proposed PGA clause shall be accompanied by a cost study in conformity with the requirements of § 154.63. This study must be based upon actual costs for the 12 months of most recently available actual experience and may include annualization for changes which actually occurred in the 12 month period. If a cost-of-service study having a test period ending less than

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[1] For the purpose of this paragraph, purchased gas costs represent the cost of wellhead purchases, field line purchases, plant outlet purchases, transmission line purchases, and pipeline or affiliate production that qualifies for and is being afforded an area of nationwide rate under § 2.66 of this chapter, a maximum lawful price under § 270.203 of this chapter, or a rate specified under § 154.42(b)(1). Nonconcurrent exchange transactions may be reflected as a cost of purchased gas. If a company has underground storage, the cost of purchased gas included in Accounts 800, 801, 802, and 803, and where applicable; Account 806, shall be debited or credited to reflect the net injections or withdrawals from underground storage. This adjustment shall be prorated between pipeline and producer supply. New pipeline supplies (contractual daily delivery obligations) and liquified natural gas, synthetic natural gas, gas from coal gasification, and pipeline production when priced on a cost of service basis pursuant to Commission authorization shall not be reflected in a PGA clause without prior Commission approval.

12 months prior to the date of submission of the proposed PGA clause is on file in another docket, that cost study may be utilized in lieu of filing a cost study with the proposed PGA clause.

(ii) The method(s) of determining changes in cost of gas purchased from producer and pipeline suppliers shall be separately established. Any purchase of deregulated high-cost gas from affiliated producers shall be so identified in the schedules of gas costs. Increases in cost of gas purchased from small producers shall be shown separately, and the provisions of Order No. 428 shall apply to these increases. Producer rate changes shall be applied to the commodity component of the existing rates of a pipeline company's two-part rates and to the volumetric rates of a pipeline company's one-part rates. Pipeline supplier rate changes shall be applied "as billed" to a pipeline company's two-part rates and shall be applied to a pipeline company's volumetric rates in the manner which maintains the pipeline company's existing one-part rate design.

(iii) The purchased gas cost adjustment shall be reflected in the company's rates only when it represents a dollar amount equal to at least 1 mill ($0.001) per Mcf of annual jurisdictional sales. This limitation is not applicable to the unrecovered purchased gas costs for which provision is made in paragraph (d)(4)(iv) of this section.

(iv)(*a*) Rate changes which reflect both the projected cost of purchased gas and a revised surcharge to clear the amounts accrued in the deferred account for both producer and pipeline suppliers shall be computed and filed not more frequently than semi-annually. Pipeline companies may reflect in their rates such changes as are permitted to producers of natural gas under the Natural Gas Policy Act of 1978. Pipeline companies with semi-annual adjustment dates may not reflect in their purchased gas pattern any supply which is not attached to its system as of the effective date of the proposed rate change.

JANUARY 1, AND JULY 1

Alabama-Tennessee Natural Gas Company
East Tennessee Natural Gas Company
Chattanooga Gas Company, a Division of
Jupiter Industries, Inc.
Granite State Gas Transmission, Inc.
Midwestern Gas Transmission Company
Sea Robin Pipeline Company
Southern Natural Gas Company
South Georgia Natural Gas Company
Tennessee Gas Pipeline Company,
a Division of Tenneco, Inc.
Tennessee Natural Gas Lines, Inc.
United Gas Pipe Line Company
Distrigas of Massachusetts Corporation
Gas Gathering Corporation

FEBRUARY 1, AND AUGUST 1

Lawrenceburg Gas Transmission Corporation
Mid Louisiana Gas Company
National Fuel Gas Supply Corporation
Texas Eastern Transmission Corporation
Texas Gas Transmission Corporation
Utah Gas Service Company

MARCH 1, AND SEPTEMBER 1

Algonquin Gas Transmission Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
Eastern Shore Natural Gas Company
Mississippi River Transmission Corporation
Natural Gas Pipeline Company of America
North Penn Gas Company
Panhandle Eastern Pipe Line Company
Transcontinental Gas Pipe Line Corporation
Trunkline Gas Company

APRIL 1, AND OCTOBER 1

Arkansas Louisiana Gas Company
El Paso Natural Gas Company
Florida Gas Transmission Company
Mountain Fuel Supply Company
Northwest Pipeline Corporation
Oklahoma Natural Gas Gathering Corporation
Pacific Interstate Transmission Company
Raton Natural Gas Company
Southwest Gas Corporation
Transwestern Pipeline Company

APRIL 23, AND OCTOBER 23

Cities Service Gas Company
Commercial Pipeline Company, Inc.

MAY 1, AND NOVEMBER 1

Kentucky-West Virginia Gas Company
McCulloch Interstate Gas Company
Western Gas Interstate Company
Michigan Wisconsin Pipe Line Company
Montana-Dakota Utilities Company
Valley Gas Transmission, Inc.
Great Lakes Gas Transmission Company

OCTOBER 1

Colorado Interstate Gas Company
Northern Natural Gas Company (Peoples Division)

NOVEMBER 1

Inter-City Minnesota Pipelines Ltd., Inc.

JUNE 1, AND DECEMBER 1

Louisiana-Nevada Transit Company
Mountain Fuel Resources, Inc.
South Texas Natural Gas Gathering Company
Western Transmission Corporation
Texas Gas Pipe Line Corporation

DECEMBER 1

Kansas-Nebraska Natural Gas Company

DECEMBER 27

Northern Natural Gas Company

(*b*) To assure recovery of all purchased gas costs, the Commission has prescribed deferred purchased gas cost accounts. For Class A and B natural gas companies, the deferred account is "Account 191, Unrecovered purchased gas costs," 18 CFR Part 201, Balance Sheet Accounts, 191 and is used in conjunction with "Account 805.1, Purchased gas cost adjustments," 18 CFR Part 201, Balance Sheet Accounts, 805.1. For Class C and D Natural gas companies, the deferred account is "Account 191, Unrecovered purchased gas costs," 18 CFR Part 204, Balance Sheet Accounts, 191 and is used in conjunction with "Account 731.1, purchased gas cost Adjustments," 18 CFR Part 201, Balance Sheet Accounts, 731.1. Pipelines using deferred accounting procedures shall be subject to the provisions of these accounts. In order to qualify for carrying charges, the company is required to adopt the principles of interperiod income tax allocation in connection with the balances recorded in the unrecovered purchased gas cost account.

(*c*) Carrying charges shall be computed based on the ending balances in Account 191. The rate for computation of carrying charges shall be the current rate of interest on pipeline refunds set forth in § 154.67(d) (2) (iii) (A) with interest compounded in the manner set forth in § 154.67(d) (2) (iii) (B). Carrying charges shall be debited to Account 191 if the ending balance in Account 191 for the month is positive and shall be credited to Account 191 if the ending balance is negative. The carrying charges shall be computed monthly on the net balances in Account No. 191 and the related amounts in

Account Nos. 283 or 190, as appropriate, as of the end of the immediately preceding month.

(*d*) After the initial 6-month period following the effectiveness of the PGA clause and after the company has chosen to maintain an unrecovered purchase gas cost account (Account No. 191) the company shall adjust its rate(s), either positively or negatively, to include a surcharge to recover or return the balance which has accumulated in the unrecovered purchase gas cost account (Account No. 191) in the preceding 6-month period. This procedure will be followed in each succeeding 6-month period.

(v) The company shall file with the Commission and post pursuant to § 154.16 at least 30 days prior to the date on which any change(s) in its existing rates is to become effective, a single tariff sheet, entitled Original PGA-1, which contains the information in the margins as set out and required in § 154.33(d) and which shows the following:

NOTICE OF PURCHASED GAS COST ADJUSTMENT RE CHANGE AT

Rate schedule	Base tariff rate [2]	Current adjustment	Cumulative adjustment	Rate after current adjustment

[2] The base tariff rate is the effective rate on file with the Commission excluding adjustments effected pursuant to a PGA clause.

Simultaneously with the filing of the above described tariff sheet, the company shall furnish the Commission, jurisdictional customers, and interested state commissions a report containing detailed computations which clearly show the derivation of the Current Adjustment to be

applied to its existing rates. Exhibit A[3] hereto details the information which is necessary for the Commission to verify the accuracy of the proposed adjustment. In the event the material submitted is deficient, the company will be notified of the deficiencies. No filing date will be assigned until the deficiencies are eliminated.

(vi) (*a*) Upon the expiration of 36 months after the effective date of the PGA clause, the company shall file a tariff sheet(s) restating its rates to establish a new Base Tariff Rate. The Company shall state its agreement that this filing will automatically be subject to refund concurrently with the filing at the end of 36 months of the tariff sheets establishing a new Base Tariff Rate until an agreement is reached or a Commission determination is made. With this tariff sheet(s) the company shall file a study in the form and with the content prescribed by § 154.38 of the Regulations, except Statements O and P, to support the new Base Tariff Rate. (If the Company has a section 5(a) case pending a final order or has made a section 4(e) filing for which the proposed rates would not become effective before termination of the 36-month period, a study from that proceeding may be utilized.) This study shall be based upon actual costs for the twelve months of most recently available experience, provided that the 12-month period used ends not more than 4 months prior to the expiration of the 36-month period. Annualization for changes which actually occurred in the 12 months will be permitted. This study shall be served on the company's jurisdictional customers and interested State commissions concurrently with the Company's filing with the Commission.

(*b*) If a section 4(e) case is filed before the expiration of the 36-month period, a new 36-month period will start running when the proposed rates go into effect. Rates determined by the Commission in a section 4(e) or

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[3] Filed as a part of the original document.

a 5(a) proceeding or rates in a settlement agreement approved by the Commission shall establish the new Base Tariff Rate when they become effective pursuant to a final order, and a new 36-month period will start running.

(*c*) If either as a result of conferences among the company, its jurisdictional customers, interested State commissions, and the Commission staff, or as a result of Commission determination after hearing, it is found, based on the aforementioned study, that the jurisdictional cost of service is less than the jurisdictional revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or determined, and shall refund to its jurisdictional customers any excess amounts collected subject to refund to the date of billing under the revised tariff sheets, with interest to that date. This refund obligation shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate.

(vii) The jurisdictional portion of all refunds received from suppliers (including interest received) applicable to purchases after a PGA clause becomes effective shall be flowed through to the company's jurisdictional customers. If the company utilizes deferred accounting for unrecovered purchased gas costs, the jurisdictional portion of all refunds received (including interest received) shall be credited to the unrecovered purchased gas cost account. If the company does not utilize deferred accounting and holds supplier refunds more than 30 days, the jurisdictional portion of supplier refunds (including interest received) applicable to purchases after a PGA clause becomes effective shall be flowed through to the

company's jurisdictional customers with interest. Any requirement for the serving and filing of reports, showing details of the computations of any such refunds, shall be either as agreed in settlement discussions held among the company, jurisdictional customers, interested State commissions, other interested parties, and the Commission staff, or as prescribed by Commission order.

(viii) Pipelines must file tariff sheets pursuant to this part to conform their existing PGA clauses on or before December 1, 1978, which shall become effective as of January 1, 1979. After January 1, 1979, a pipeline shall not be permitted to track changes in purchased gas costs under a PGA clause unless the PGA clause in effect at that time conforms to the rule promulgated in Order No. 13.

(ix) *Election of a PGA clause.* A natural gas pipeline company shall elect once every three years whether to recover all changes in purchased gas costs either through general rate filings made under § 154.63 or through filings made under a PGA clause prescribed in this paragraph.

(*a*) *Procedure for election.* For purposes of this paragraph, "election period" means a three year calendar period commencing on January 1, of every third year. The first election period commences on January 1, 1979. The election for an election period must be made on or before the first day of the December preceding the new election period and is binding for the entire election. Any company which has a PGA clause in its tariff on December 1, 1978, shall be considered to have elected to recover its changes in purchased gas cost exclusively through the PGA clause. However, such a company with a PGA clause in its tariff on December 1, 1978 which chooses not to use the PGA clause must notify the Commission by December 1, 1978 that it has elected not to recover any of its changes in purchased gas cost under

a PGA clause. It shall file revised tariffs sheets eliminating the PGA clause from its tariff, by December 15, 1978 to become effective January 1, 1979. Waiver of the notice requirements in § 154.22 is hereby granted to permit such conforming tariff sheets to become effective January 1, 1979. Any company which elects the PGA clause option pursuant to this paragraph may terminate its PGA clause effective as of the next election period by filing revised tariff sheets eliminating the PGA clause from its tariff. Such tariff sheets must be filed on or before December 1, preceding a new election period to become effective on the first January 1 of the new election period. If a company does not make such a filing, it shall be considered to have elected to renew its PGA clause option for the new election period. A company which has chosen the non-PGA option for an election period may file revised tariff sheets implementing the PGA clause option for the next election period. Such tariff sheets must be filed on or before the December 1 preceding a new election period to make the PGA clause effective on the first January 1 of that election period.

(*b*) *PGA clause option.* Any company which has elected the PGA clause option for the first election period, beginning on January 1, 1979, may not include any changes in purchased gas cost in a general section 4 rate filing made under § 154.63 and which is filed in December 1978. Thereafter, during an election period for which a company has elected the PGA option, it shall file for changes in its purchased gas cost exclusively through its PGA clause. The company may not file tariff sheets eliminating its PGA clause from its effective tariff during the election period and may not include any changes in its purchased gas cost in a general section 4 rate filing made under § 154.63, during the election period for which the PGA clause is in effect: *Provided, however,* That a company may request the Commission for a waiver of the election and if granted may include changes in pur-

chased gas cost in a general section 4 rate filing made under § 154.63.

To receive a waiver, the company must demonstrate that (*1*) it is unable to arrange for financing of the balances being carried in the deferred account (Account No. 191), or (*2*) is not able to earn its overall rate of return last allowed by the Commission because of the magnitude of the balances in the deferred account (Account No. 191) and a significant difference between the costs of financing the deferred amounts and the carrying charges allowed under paragraph (d) (4) (iv) (*c*) of this section.

(*c*) *Non-PGA option.* During an election period for which the company has elected the non-PGA option, a company shall file for changes in purchased gas cost exclusively in a general section 4 rate filing made under § 154.63. The company may not file tariff sheets to include a PGA clause in its effective tariff during that election period.

(x) *One-time passthrough of certain estimated NGPA Costs.* (*a*) *General Rule.* Notwithstanding the provisions of clause (iv) (*d*) of paragraph (d) (4), any natural gas pipeline company with a PGA clause in effect on January 1, 1979, may estimate its changes in purchased gas cost directly attributable to the Natural Gas Policy Act of 1978 (NGPA) up to and including the month preceding the effective date of its first PGA tariff adjustment effective on or after January 1, 1979, provided however, for those months for which the pipeline has actual NGPA costs reflected in its deferred account, the actual amounts must be used in calculating the surcharge. The amount estimated may be added to the actual amounts reflected in the pipeline's deferred account (Account 191) for purposes of calculating the PGA surcharge included in the pipeline's first PGA rate adjustment to be effective on or after January 1, 1979.

(b) Option for pipelines with a PGA rate adjustment effective on January 1, 1979. Those pipelines with PGA rate adjustments to become effective on January 1, 1979 may elect to include the adjustment for NGPA costs prescribed in clause (x)(*a*) either (i) in their PGA rate adjustment to become effective on January 1, 1979, or (ii) in their first PGA rate adjustment filed on or after January 1, 1979. Those pipelines choosing (i) must file amended PGA rate sheets which reflect the adjustment allowed in clause (x)(*a*) no later than December 15, 1978; the notice requirements of § 154.138(d)(4)(v) and the notice provisions in the pipeline's PGA clause tariff provisions are hereby waived for such PGA tariff filings made during December 1978.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 84-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
CITY OF WINFIELD, KANSAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE CITY OF WINFIELD, KANSAS

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January 8, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review an unreported memorandum decision of the United States Court of Appeals for the District of Columbia Circuit with no precedential effect in which the Court of Appeals affirmed the unanimous rulings of the Federal Energy Regulatory Commission and two of its Administrative Law Judges, when the Court of Appeals' decision is amply supported by the applicable law and is consistent with the decisions of other federal courts of appeals on the same subject.

2. Whether the Federal Energy Regulatory Commission acted in contravention of Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, and this Court's decision in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), when it reduced Arkansas Louisiana Gas Company's ("Arkla") rates in a 36 month review proceeding conducted pursuant to Section 154.38(d)(4)(vi)(*a*) of its regulations, 18 C.F.R. § 154.38(d)(4)(vi)(*a*), to a level above that of Arkla's "last firm rate," *i.e.*, its old Base Tariff Rate, as of the effective date of Arkla's 36 month filing.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-716

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
CITY OF WINFIELD, KANSAS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE CITY OF WINFIELD, KANSAS

Respondent City of Winfield, Kansas ("Winfield"),[1] in accordance with Sup.Ct.R. 22, hereby opposes the "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" (Petition") filed in the above-captioned docket by Arkansas

[1] Winfield was an intervenor in the court of appeals proceeding below and accordingly is considered a respondent in this Court by virtue of Sup.Ct.R. 19.6.

Louisiana Gas Company, a Division of Arkla, Inc. ("Arkla"), on November 5, 1984.

OPINIONS BELOW

The description of the opinions below contained in Arkla's Petition at 1-2 is acceptable to Winfield.[2]

JURISDICTION

Winfield concurs in Arkla's representations (Arkla Petition at 2-3) that (i) the Commission had jurisdiction to review Arkla's rates pursuant to Section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c; (ii) Arkla sought review in the Court of Appeals of the Commission's determinations pursuant to Section 19(b) of the NGA, 15 U.S.C. § 717r(b); (iii) the Court of Appeals entered its judgment on June 14, 1984, and denied rehearing on August 8, 1984; and (iv) assuming *arguendo* that this Court determines that this case is worthy of its review, it has jurisdiction to hear it under 28 U.S.C. § 1254(1) and Section 19(b) of the NGA.

STATUTES AND REGULATIONS INVOLVED

The memorandum opinion of the Court of Appeals and the opinions of the Comn ission below fully complied with the dictates of Section 4 of the NGA, 15 U.S.C. § 717c, including the portion of Section 4(e), 15 U.S.C. § 717c(e), which Arkla quoted in its Petition at 3. Winfield disputes that Section 5(a) of the NGA, 15 U.S.C. § 717d(a), has any special relevance to the issues presented here.

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[2] In discussing the opinions of the Federal Energy Regulatory Commission ("FERC" or "Commission"), Winfield will cite to both the Federal Energy Regulatory Commission Reporter, published by Commerce Clearing House, Inc. ("FERC CCH"), the official reporter of the Commission, and to the Appendix prepared by Arkla to accompany its Petition. As Arkla noted, the Court of Appeals' *per curiam* memorandum opinion was unreported pursuant to D.C. Cir. Rule 13(c), and its order denying rehearing was also unreported; accordingly, in referring to these documents, Winfield will cite only to Arkla's Appendix.

While Arkla fails to mention it, the Commission's regulation governing purchased gas adjustment ("PGA") filings of interstate natural gas pipelines, 18 C.F.R. § 154.38(d)(4), is at the heart of this case. 18 C.F.R. § 154.38(d)(4)(vi) (*a*)-(*c*) are of particular importance:

> (iv)(*a*) Upon the expiration of 36 months after the effective date of the PGA clause, the company shall file a tariff sheet(s) restating its rates to establish a new Base Tariff Rate. The Company shall state its agreement that this filing will automatically be subject to refund concurrently with the filing at the end of 36 months of the tariff sheets establishing a new Base Tariff Rate until an agreement is reached or a Commission determination is made. With this tariff sheet(s) the company shall file a study in the form and with the content prescribed by § 154.38 of the Regulations, except Statements O and P, to support the new Base Tariff Rate. (If the Company has a section 5(a) case pending a final order or has a section 4(e) filing for which the proposed rates would not become effective before termination of the 36-month period, a study from that proceeding may be utilized.) This study shall be based upon actual costs for the twelve months of most recently available experience, provided that the 12-month period used ends not more than 4 months prior to the expiration of the 36-month period. Annualization for changes which actually occurred in the 12 months will be permitted. This study shall be served on the company's jurisdictional customers and interested State commissions concurrently with the Company's filing with the Commission.
>
> (*b*) If a section 4(e) case is filed before the expiration of the 36-month period, a new 36-month period will start running when the proposed rates go into effect. Rates determined by the Commission in a section 4(e) or a 5(a) proceeding or rates in a settlement agreement approved by the Commission shall establish the new Base Tariff Rate when they

become effective pursuant to a final order, and a new 36-month period will start running.

(*c*) If either as a result of conferences among the company, its jurisdictional customers, interested State commissions, and the Commission staff, or as a result of Commission determination after hearing, it is found, based on the aforementioned study, that the jurisdictional cost of service is less than the jurisdictional revenues collected for the same 12-month period, as adjusted, the company shall restate its Base Tariff Rate, shall file with the Commission a revised tariff sheet(s) reflecting a reduction in its jurisdictional rates by an amount equal to the excess revenues agreed upon or determined, and shall refund to its jurisdictional customers any excess amounts collected subject to refund to the date of billing under the revised tariff sheets, with interest to that date. This refund obligation shall be limited to the amount collected in excess of the old Base Tariff Rate, and rate reductions, if any, below the old Base Tariff Rate shall be prospective from the date of the Commission's final order determining a new Base Tariff Rate.

Boiled down to its essentials, Arkla claims that the Commission and the Court of Appeals applied 18 C.F.R. § 154.38d(4)(vi)(*c*) in contravention of Section 4(e) of the NGA and of this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

STATEMENT OF THE CASE

As Arkla notes in its Petition at 4, Arkla makes jurisdictional sales for resale to Northwest Central Pipeline Corporation under its Rate Schedule X-26 and to four distribution customers in Oklahoma and Kansas under its Rate Schedule G-2. Winfield is the largest of Arkla's four G-2 purchasers. Winfield is a city organized under the laws of the State of Kansas and is a "municipality" as that term is defined in Section 2(3) of the NGA, 15

U.S.C. § 717a(3). It owns and operates the gas distribution system serving its community for the benefit of its citizens and purchases all of its gas supplies for resale therein from Arkla. Winfield accordingly participates in Arkla's rate proceedings before the Commission to ensure that the rate Winfield pays Arkla is the "lowest reasonable rate consistent with the maintenance of adequate service in the public interest." [3]

Arkla correctly describes (Petition at 4) the facts surrounding the filing of its rate case at issue here. It also correctly describes the mechanism set out in 18 C.F.R. § 154.38(d)(4) which permits interstate pipelines to make twice-yearly PGA filings to pass through to their customers on a current basis their cost of purchased gas. Arkla, however, omits certain vital facts.

First, the PGA filing device is an administratively-created exception to the statutory requirement that interstate pipelines increase their rates only by a full-blown rate increase filing made pursuant to NGA Sections 4(d), 15 U.S.C. § 717c(d), and 4(e). In the proceeding concerning such filing, the Commission scrutinizes *all* of a pipeline's costs and revenues to determine the just and reasonable unit rates. The Commission's predecessor, the Federal Power Commission,[4] in response to a growing backlog of Section 4 rate filings seeking recovery of increased purchased gas costs, created a streamlined filing procedure in 1972 that permitted pipelines that elected to utilize it to recover their purchased gas costs through twice-yearly filings reflecting increases or decreases in these costs alone.[5]

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[3] FPC v. Hope Natural Gas Co., 320 U.S. 591, 611 (1944).

[4] In 1977 the Federal Power Commission was abolished and its functions transferred to the newly-formed Federal Energy Regulation Commission. Winfield will refer to both entities as the "Commission".

[5] In effect, the Commission decided to permit interstate pipelines to "track" increases (and decreases) in their purchased gas

This new privilege, however, did not come without a price. To ensure that pipelines did not use PGA filings as a tool to avoid scrutiny of their rates while automatically collecting increases in purchased gas costs, the Commission required all pipelines that elected to use the PGA filing device to file a complete cost and revenue study at least once every 36 months and to agree in advance that its rates would be subject to refund concurrently with the effective date of the 36 month filing. 18 C.F.R. § 154.38(d)(4)(vi)(*a*). If the Commission found that the pipeline's rates were indeed excessive, it would reduce the rates to a just and reasonable level as of the date of the 36 month filing, subject only to the requirement that the new rate it established, *i.e.*, the new Base Tariff Rate, would not be lower than the rate established in the pipeline's last rate case effective 36 months earlier (the old Base Tariff Rate). *See* 18 C.F.R. § 154.38(d)(4)(vi)(*c*). If the new Base Tariff Rate was found to be lower than the old Base Tariff Rate, then any rate reduction below the old Base Tariff Rate would be prospective from the date of the final Commission order establishing the new Base Tariff Rate. *Id.*

Arkla admits, as it must, that the Section 4 rate increase involved here, which became effective on November 1, 1980, was filed to satisfy the 36 month filing requirement, which practice is permissible under 18 C.F.R. § 154.38(d)(4)(vi)(*a*). Arkla Petition at 5. It fails to note, though, that by making this filing, it opened all of its costs and revenues to Commission scrutiny and took the risk that the Commission would (i) find the new Base Tariff Rate proposed by Arkla to be unreasonably high, (ii) determine the just and reasonable new Base Tariff

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costs in their rates on a current basis. The Commission's general policy has been and continues to be to discourage any "trackers" in pipeline rates that would reflect increases in costs automatically. *See, e.g.*, El Paso Natural Gas Co., 28 FERC (CCH) ¶ 61,185 (1984) (Commission denied pipeline request for tracker reflecting certain accrued gas purchase prepayments). The PGA is by far the most notable exception to this policy.

Rate, and (iii) order Arkla to refund the difference between the new Base Tariff Rate that Arkla put into effect and the Commission's just and reasonable new Base Tariff Rate. This is in fact exactly what happened.

Applying these principles to the chart at the top of page 6 of Arkla's Petition reveals the following situation. Arkla filed for a rate of 178.25¢ per Mcf (Arkla's suggested new Base Tariff Rate), which rate became effective subject to refund by Arkla's prior agreement on November 1, 1980. After examination of Arkla's costs and revenues, the Presiding Administrative Law Judge found and the Commission agreed that the just and reasonable new Base Tariff Rate was 156.09¢ per Mcf. Because the new Base Tariff Rate of 156.09¢ was not less than the old Base Tariff Rate of 78.11¢, *i.e.*, the rate set in Arkla's last full Section 4 rate proceeding (which Arkla refers to as the Pre-existing Base Rate), the Commission ordered refunds of the full difference as of the November 1, 1980 effective date of Arkla's 36 month filing.

Arkla's implication in its Statement of Facts (Petition at 6-7) that the Commission had to accept as a given Arkla's PGA adjustments of 90.62¢ which had accumulated since the effective date of Arkla's old Base Tariff Rate, and that any reduction of more than 9.52¢ (the difference between the new Base Tariff Rate proposed by Arkla and the old Base Tariff Rate plus the cumulative PGA adjustments) back to the November 1, 1980 effective date of Arkla's new rate filing was therefore a "retroactive" refund, is erroneous. To the contrary, Arkla effected the intervening PGA increases by streamlined PGA filings which the Commission did not scrutinize but which it merely accepted for filing and permitted to go into effect.[6] Moreover, the *quid pro quo* that Arkla agreed to

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[6] Section 154.23 of the Commission's regulations provides that "[t]he acceptance for filing of any tariff, contract, or part thereof is not to be considered as approval by the Commission." 18 C.F.R. § 154.23.

when it decided to recover its purchased gas costs through PGA filings rather than Section 4 rate increase filings was that it would subject *all* of its costs and revenues to Commission review every 36 months and that the Commission in that review proceeding could net all costs and revenues (including purchased gas costs) against each other in determining the new Base Tariff Rate. So long as the old Base Tariff Rate (here 78.11¢ per Mcf) did not exceed the new Base Tariff Rate (here 156.09¢ per Mcf), the Commission was free to reduce Arkla's rates as of November 1, 1980, as it did indeed do. Hence, there was no illegal "retroactive" 12.64¢ per Mcf refund, as Arkla implies. Arkla Petition at 7.

SUMMARY OF REASONS FOR DENYING THE WRIT

The issue that Arkla would have this Court review is not complicated, nor did it cause any difficulties for the various tribunals below. The Commission and two different Presiding Administrative Law Judges fully considered Arkla's claims and rejected them. The Commission did not even consider the issue worthy of extended discussion; rather, it simply affirmed the Presiding Administrative Law Judge's Initial Decision on the issue. Likewise, the Court of Appeals affirmed the Commission in a *per curiam* memorandum opinion that it did not even designate for publication, thus rendering it of no precedential effect. Subsequently, the Court denied Arkla rehearing as well. Arkla's claims have received full consideration by four different decision-makers and have been unanimously rejected. No grounds have been presented by Arkla meriting yet additional review by this Court.

Nor is there any conflict in the decisions of the various federal courts of appeals on this issue. While Arkla attempts to construct a conflict, the primary case it relies upon, *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), did not reach the particular issue considered here. In fact, the Commission opinion that was affirmed in that case made the same distinction

that the Commission made below in this case between the use of full Section 4 rate proceedings under the NGA and "tracking" rate increases in calculating the "last firm rate."

Moreover, while Arkla attempts to dismiss it in a footnote, the decision of the United States Court of Appeals for the Eleventh Circuit in *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984), did reach the exact issue that the Court of Appeals decided below, and the Eleventh Circuit there reached the same result as the Court of Appeals did here. Thus, there is no conflict of authority that would merit this Court's attention.

Turning to the merits of Arkla's claims, the Commission's actions below did not violate Section 4 of the NGA or this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). The Commission made it clear at the time that it finally promulgated 18 C.F.R. § 154.38(d)(4)(vi)(*c*) in 1972 that the refund floor below which refunds could not be made in a 36 month review proceeding was the old Base Tariff Rate *without any interim tracking-type rate increases*. Thus, the applicable "last firm rate" is Arkla's old Base Tariff Rate of 78.11¢ per Mcf, below which rate the Commission did not require Arkla to make refunds. The Court of Appeals below accordingly found that the Commission's refund order was in compliance with the dictates of Section 4 of the NGA and this Court's decision in *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). There is no reason for this Court to review or disturb its holding.

REASONS FOR DENYING THE WRIT

1. The Course Of The Proceedings Below Amply Demonstrates The Lack Of Merit In Arkla's Claims.

Arkla's claim that any refund the Commission might order below the old Base Tariff Rate plus cumulative PGA adjustments would constitute a "retroactive" refund was one of the primary issues litigated in the proceedings

below. Arkla first raised the claim to Presiding Administrative Law Judge Stephen M. Charno in connection with his consideration of a proposed settlement of Arkla's rate increase. After hearing extensive argument (R. 14-50), Presiding Judge Charno ruled from the bench (R. 104-05) that the proper refund "floor" in this case was the old Base Tariff Rate without any subsequent PGA adjustments.

Presiding Judge Charno was later replaced by Presiding Administrative Law Judge George P. Lewnes, who actually heard the case on the merits and issued the Initial Decision. After permitting Arkla to reargue the issue *de novo* on brief and reviewing the legal arguments of all parties, he too found that the refund floor below which Arkla's rates could not be reduced effective November 1, 1980, was the old Base Tariff Rate without subsequent PGA increases. *Arkansas Louisiana Gas Co.*, 19 FERC (CCH) ¶ 63,008 at pp. 65,064-66 (1982), App. 20a-25a.

Arkla appealed this aspect of the Presiding Judge's Initial Decision to the full Commission along with several other issues. On review of the Presiding Judge's Initial Decision, the Commission in its Opinion No. 160 affirmed the Presiding Judge on this issue without comment. *Arkansas Louisiana Gas Co.*, 22 FERC (CCH) ¶ 61,125 (1983), App. 10a-17a. Arkla again raised the issue on rehearing. In Opinion No. 160-A, 23 FERC ¶ 61,030 (1983), App. 18a-19a, the Commission denied rehearing of this issue, specifically confirming Presiding Judge Lewnes' ruling.

Arkla then sought judicial review of the Commission's opinions in the Court of Appeals. After reviewing the briefs of the parties and hearing oral argument on the issue, the panel (comprised of Circuit Judges Mikva and Bork and Senior Circuit Judge Bazelon) in an unreported *per curiam* memorandum opinion issued pursuant

to D.C. Cir. Rule 13(c) affirmed the Commission's opinions in their entirety. App. 1a-6a. Arkla sought rehearing of the Court of Appeals' memorandum opinion, which the panel denied by a one sentence unreported order. App. 7a. Arkla's Petition to this Court followed.

As the above chronology makes abundantly clear, Arkla's argument has already been presented to four decisionmakers (Presiding Judge Charno, Presiding Judge Lewnes, the Commission itself, and the Court of Appeals) no less than six times. All resolved the issue against Arkla. None of them perceived the violation of the NGA that Arkla here asserts. The Commission and the Court did not even regard the question as a close one, as evidenced by the Commission's simple affirmance of Presiding Judge Lewnes' holding and the Court's determination to decide the issue in an unreported *per curiam* memorandum opinion. This unanimity of opinion belies Arkla's claims that its arguments merit this Court's attention.

2. There Is No Conflict Between The Federal Courts Of Appeals' Decisions On This Issue.

Arkla claims in its Petition (at 9, 11-12) that the Court of Appeals' decision below conflicts with the opinion of the United States Court of Appeals for the First Circuit in *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1984) (*"Distrigas"*). This is not the case. If anything, *Distrigas* supports the decision of the Court of Appeals below.

In *Distrigas*, the First Circuit reviewed the Commission's opinions in *Distrigas of Massachusetts Corp.*, Opinion No. 178, 23 FERC (CCH) ¶ 61,416 (1983) and Opinion No. 178-A, 24 FERC (CCH) ¶ 61,250 (1983). In Opinion No. 178, the Commission itself held that it had no statutory power to reduce Distrigas' rates other than prospectively below the Company's last Commission-approved rate (in that instance, the initial rates

approved by the Commission in the course of issuing Distrigas its original certificate of public convenience and necessity, which rates were reached in a settlement agreement), citing *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968). *See* Opinion No. 178, 23 FERC (CCH) ¶ 61,416 at p. 61,921. The First Circuit in *Distrigas* affirmed this Commission holding.

Opinion No. 178, however, made clear that the refund floor below which Distrigas could not be made to reduce its rates other than prospectively was its last *Commission-approved* rate, not whatever rate Distrigas happened to be charging immediately prior to the time that its new rate increase became effective. The Commission specifically stated that "refunds must be limited to the level of the initial rate, *not increased by any tracking provisions*, found in DOMAC's certificate." *Id.* (emphasis supplied) (footnotes omitted). This particular aspect of the Commission's opinion was not challenged on appeal and the First Circuit did not disturb it.

Arkla's position here is not that the Commission unlawfully reduced its rates effective November 1, 1980, below the last Commission-approved rate, *i.e.*, the old Base Tariff Rate of 78.11¢ per Mcf. Rather, Arkla claims that the Commission erroneously reduced its rates as of that date below 168.73¢ per Mcf, *i.e.*, the old Base Tariff Rate *plus Arkla's cumulative PGA tracking adjustments*, which rate it was charging immediately prior to November 1, 1980. Thus, even under the Commission's holding in Opinion No. 178, which holding the First Circuit left undisturbed, Arkla's claim would be denied.

It is therefore simply not true that "in contrast to Arkla, the Commission and the court held [in *Distrigas*] that the refund power is limited to the proposed increase." Arkla Petition at 11-12. The Court of Appeals' memorandum opinion here and the First Circuit's *Distrigas* opinion do not conflict.

Also, Arkla attempts to dismiss in a footnote a recent opinion of the United States Court of Appeals for the Eleventh Circuit, *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (1984) (*"Florida Gas"*), claiming that the court there "did not reach the precise issue involved here." Arkla Petition at 12 n. 17. To the contrary, that case does address the issue Arkla raises here. The Eleventh Circuit there approved the Commission's decision in *Florida Gas Transmission Co.*, 19 FERC (CCH) ¶ 61,293, *reh'g denied*, 20 FERC ¶ 61,195 (1982), in which the Commission held that a pipeline's transportation rates as well as its sales rates are subject to restatement and refund in a 36 month review proceeding conducted pursuant to 18 C.F.R. § 154.38(d)(4)(vi)(*a*).[7]

The pipeline involved in *Florida Gas* appealed the Commission's decision, claiming that since it had increased only its sales rates by virtue of its PGA filings, it should not be required to restate both its sales and transportation rates in its 36 month filing and that its transportation rates should not be made subject to refund as of the effective date of its 36 month filing. The Eleventh Circuit affirmed the Commission's decision, stating:

> Florida Gas' argument that its transportation costs are being lowered below "the last clean rate" fails to recognize that the Base Tariff Rate is a composite rate. Refund liability is determined by comparing the restated Base Tariff Rate with the Base Tariff Rate as finally approved by the Commission. 18 C.F.R. § 154.38(d)(4)(vi)(*C*). *The refund liability is measured by the previously approved Base Tariff Rate. Florida Gas' previous Base Tariff Rate*

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[7] The Commission in denying Arkla's application for rehearing on the point Arkla raises here specifically cited this case: "[w]e note that the Commission considered this question after the initial decision was issued. The Commission's decision, *Florida Gas [Transmission] Co.*, 19 FERC ¶ 61,293 (1982), supports the judge's conclusion." Opinion No. 160-A, 23 FERC (CCH) ¶ 61,030 (1983) at p. 61,074, App. 19a (footnote omitted).

> *was approved by the Commission in its 1976 section 4 review.* It is the composite rate that sets the lower limit. A change in the transportation costs cannot be held to be a violation of the "last clean rate" doctrine, a composite rate.

Florida Gas, 741 F.2d at 1311-12 (emphasis added). The Eleventh Circuit specifically held that the lower limit on the pipeline's refund liability in a 36 month review proceeding was the Base Tariff Rate previously approved in its last full Section 4 rate review, without mention of any intervening PGA tracking rate increases. Thus *Florida Gas* is both on point and in harmony with the Court of Appeals' memorandum opinion in the instant proceeding.

In short, there simply is no conflict between the decisions of the federal courts of appeals on this legal point. The Court of Appeals below was amply justified in affirming the Commission here.

Finally, assuming *arguendo* that the Court of Appeals' decision did conflict with the First Circuit's *Distrigas* opinion, it would not be a conflict that would trouble federal courts in the future. The Court of Appeals rendered its decision in an unreported memorandum opinion pursuant to D.C. Cir. Rule 13(c). Such a memorandum opinion cannot be cited as precedent even in other cases before the same Court of Appeals. *See* D.C. Cir. Rule 8(f). Thus, it is highly unlikely that the instant case will be "important for the industry as a whole." *Cf.* Arkla Petition at 17.

3. The Commission Did Not Award "Retroactive" Refunds Below The "Last Firm Rate."

While the above discussion amply shows why this Court should not allocate its limited resources to this case, Winfield will address briefly the merits of Arkla's claims.

First, contrary to Arkla's assertions (Arkla Petition at 16-17), 18 C.F.R. § 154.38(d)(4)(vi)(*c*) clearly defines the refund floor as the last Commission-approved rate without subsequent PGA or other tracking increases. Any possible doubt was resolved in the Commission's 1972 order denying rehearing of its adoption of its PGA regulations:

> Several requests for clarification and modification of Section 154.38(d)(4)(vi) were made. In order to clarify this subsection and to eliminate impracticable and unnecessary requirements, it will be revised accordingly. *It should be noted that the refund floor is the old Base Tariff Rate* [in the instant case 78.11¢ per Mcf] *and is not the last effective rate (i.e., the last Rate After Current Adjustment)* [in the instant case 168.73¢ per Mcf]. This refund floor minimizes the possibility that companies will be able to retain revenues in excess of their cost of service and permits the extent of potential liability for refunds to be known. *The potential refund liability is prospective from the date on which a cost study is filed, i.e., after termination of the 36-month period* [in the instant case November 1, 1980].

Purchased Gas Cost Adjustment Provisions In Natural Gas Pipeline Companies' FPC Gas Tariffs, Order No. 452-A, 47 FPC 1510, 1511 (1972) (emphasis added). In short, the Commission anticipated and rejected Arkla's argument when it first promulgated the PGA regulations in 1972.

As explained above, Arkla's claim that the Commission here violated its statutory powers under Section 4(e) of the NGA because it ordered refunds below the "last firm rate" in contravention of *FPC v. Sunray DX Oil Co.*, *supra*, is specious. The "last firm rate" for purposes of this case, as explained in Order No. 452-A above, was the old Base Tariff Rate without any cumulative PGA increases, and the Commission's opinion did not require

Arkla to make refunds below that rate. The Court of Appeals heard Arkla's arguments on this point, fully considered them, and then affirmed the Commission's opinions. App. 3a-4a.[8]

As this Court has noted, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarassing conflict of opinion and authority between the circuit courts of appeal.'" *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951), *quoting Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). This case, while surely of importance to Arkla, falls short of meeting the above standard. Arkla has shown no "special and important reasons" meriting the grant of its petition as is required by Sup.Ct.R. 17.1. The Court should accordingly deny Arkla's Petition.

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[8] The Interstate Natural Gas Association of America ("INGAA") in its "Brief Amicus Curiae in Support of Petitioner" parrots these same arguments, failing even to cite to the applicable PGA regulations. This is not a "simple" Section 4 rate case, as INGAA apparently believes. INGAA Brief Amicus Curiae at 3. INGAA's obvious unfamiliarity with the facts below only confirms Winfield's belief that INGAA's participation as an *amicus curiae* would not enhance this Court's understanding of the issues. Rather, INGAA's presence is nothing more than a *post hoc* attempt to justify Arkla's argument that the Court of Appeals' unreported, non-precedential memorandum decision has national significance. It is for these reasons that Winfield has opposed INGAA's participation as an *amicus curiae*.

CONCLUSION

For the reasons set out above, Winfield respectfully requests this Court to deny Arkla's Petition in its entirety.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Pursuant to regulations adopted by the Federal Energy Regulatory Commission, a natural gas pipeline company is permitted over a three-year period, .without having to resubmit its rates for a full review under Section 4 of the Natural Gas Act, 15 U.S.C. 717c, to change its previously established just and reasonable rates so as to recover on a current basis changing costs of the natural gas it purchases for resale. In return, the pipeline agrees to refile its rates with the Federal Energy Regulatory Commission for full review at least once every three years and, during that review, to collect those rates subject to refund.

The question presented is whether the Commission, on reviewing petitioner's triennial rate filing, complied with the requirements of the Natural Gas Act when it calculated petitioner's maximum refund liability with reference to the rate established as just and reasonable three years earlier in the previous full review procedure, rather than with reference to the rate as adjusted in the interim to recover increases in purchased gas costs.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-716

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-6a) is unreported. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 8a-17a, 18a-19a) are reported at 22 F.E.R.C. ¶ 61,125 and 23 F.E.R.C. ¶ 61,030. The opinion of the administrative law judge (reproduced in part at Pet. App. 20a-25a) is reported at 19 F.E.R.C. ¶ 63,008.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on June 14, 1984. A petition for rehearing was denied on August 8, 1984 (Pet. App. 7a). The petition for a writ of certiorari was filed on November 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 717r(b).

STATUTE AND REGULATION INVOLVED

Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), is reproduced at Pet. App. 27a-28a. The Commission's purchased gas adjustment regulation, 18 C.F.R. 154.38(d)(4), is reproduced at Pet. App. 30a-41a.

STATEMENT

1. Under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, the Federal Energy Regulatory Commission has jurisdiction over wholesale rates charged by interstate pipelines for the sale and transportation of natural gas in interstate commerce. Section 4(d) of the Act, 15 U.S.C. 717c(d), provides that before a pipeline may increase its rates, it must file with the Commission a new rate schedule showing the changes to be made. Section 4(e) of the Act provides that the Commission may order a hearing on the lawfulness of the new rate filing and may suspend the effectiveness of the new rate for up to five months, after which the pipeline may collect the new rate, subject to refund. In *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968), this Court held that if the Commission grants refunds under Section 4(e), they must be limited to the amount of the increase requested under Section 4(d).

One of the most volatile elements of a pipeline's rates is the cost of the gas it purchases for resale. Until 1972, a pipeline could obtain a rate increase based on changes in this single cost element only by submitting a full-scale general rate increase filing under Section 4 of the Act, 15 U.S.C. 717c. In 1972, the Commission promulgated a regulation authorizing pipelines to make adjustments to their filed and approved rates to reflect changes in their cost of purchased gas. Order No. 452, 47 F.P.C. 1049 (1972), amended, Order No. 452-A, 47 F.P.C. 1510 (1972), codified at 18 C.F.R. 154.38(d)(4). The tariff provisions authorized by this regulation are called "purchased gas adjustment" or "PGA" clauses. The provisions "permit pipeline companies to protect themselves against supplier rate increases without frequent general rate increase applications;" help to prevent

"prolonged delays in the final determination of proper rate levels [that] frustrate the administrative process;" and serve the interest of the ultimate consumer by requiring that companies "automatically reduce rates to reflect purchased gas decreases" and by providing for "periodic review and investigation into the companies' total cost of service." 47 F.P.C. at 1050-1051; Pet. App. 21a-22a.

The purchased gas adjustment regulation is not mandatory; the decision whether to recover purchased gas costs through Section 4 general rate filings or through the PGA mechanism is left to the company. 18 C.F.R. 154.38(d)(4)(ix). If a company elects the PGA alternative, it may adjust its filed "base tariff" rates every six months to reflect changes in its current cost of purchased gas, based on updated purchased gas data submitted to the Commission. 18 C.F.R. 154.38(d)(4)(iv)(*a*). In this way, a company may change its rates semiannually without the comprehensive rate increase application and full reexamination of cost-of-service data required in a Section 4 general rate case. PGA increases are authorized without consideration of any increases or decreases in other types of costs incurred by a company.

In return for the convenience of using the purchased gas adjustment mechanism, a pipeline must agree to file a restatement of its rates in order to establish a new base tariff rate at least once every three years. 18 C.F.R. 154.38(d)(4)(vi)(*a*). This triennial filing must be supported by a full cost of service study covering both purchased gas costs and other costs. Like any Section 4 general rate filing, the triennial filing is subject to Commission review and approval. If a pipeline charges the new rate for which it seeks approval during the period prior to Commission action, the Commission may order a refund to customers.

18 C.F.R. 154.38(d)(4)(vi)(*a*). However, the refund obligation is limited to the amount collected in excess of the old base tariff rate established three years earlier. 18 C.F.R. 154.38(d)(4)(vi)(*c*). See also Order No. 452-A, 47 F.P.C. at 1511.

2. Petitioner is an interstate natural gas pipeline company that has chosen to include the PGA clause in its tariff. In April 1980, petitioner filed a proposed general rate increase under Section 4 of the Act. The Commission initially suspended the effectiveness of petitioner's 1980 rate filing; on November 1, 1980, the proposed rate went into effect subject to refund pending administrative proceedings. Petitioner's rates had last been established in connection with a full Section 4 filing in November 1977;[1] since that time, petitioner had increased its rates semiannually through its PGA clause.

The administrative law judge (ALJ) concluded (Pet. App. 24a) that the rate change proposed by petitioner in 1980 was excessive. The ALJ rejected, inter alia, petitioner's contention that any refund liability must be calculated with reference to its 1977 base tariff rate as increased by the PGA adjustments it had made in the intervening period. The ALJ concluded instead that the 1977 base tariff rate itself established the floor to be used for calculation of petitioner's refund liability. *Id.* at 20a-24a. The net result was an order requiring a relatively modest refund consisting of the proposed rate increase from the time it took effect on November 1, 1980, and, for the same period, a small part of the portion of the rate representing PGA increases. Pet. 6-7.

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[1]The Commission reviewed petitioner's 1977 filing in *Opinion No. 71*, 10 F.E.R.C. ¶ 61,027 (1980), rev'd in part and remanded, 654 F.2d 435 (5th Cir. 1981), on remand, *Opinion No. 71-A*, 19 F.E.R.C. ¶ 61,012 (1982), aff'd, 701 F.2d 171 (5th Cir. 1983).

The Commission affirmed in a per curiam opinion (Pet. App. 10a-17a), in which it rejected all of petitioner's exceptions to the ALJ's decision. The Commission subsequently denied petitioner's request for rehearing (*id.* at 18a-19a). In doing so, it specifically rejected petitioner's claim that the Commission had imposed unauthorized retroactive refund liability. The Commission noted that its intervening decision in *Florida Gas Co.*, 19 F.E.R.C. ¶ 61,293 (1982), supported the ALJ's conclusion on this point.

3. The court of appeals affirmed in an unpublished per curiam opinion (Pet. App. 3a-6a). The court rejected, inter alia, petitioner's claim that the Commission had imposed improper retroactive refund liability in this case. The court stated (*id.* at 3a-4a):

> We can find no fault with FERC's interpretation and application of the PGA clause to the facts at hand. The interim streamlined filings by petitioner do not establish a new base rate below which refunds may not be ordered, for those rates are not subject to full FERC review until the triennial filing. Accordingly, it was proper for FERC to go back to the earlier 1977 base rate in fixing the floor on petitioner's refund liabilities.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioner contends that each of its six-month purchased gas adjustments raised the floor used to calculate its refund liability in connection with its subsequent triennial filing to establish a new base tariff rate. Under petitioner's view, only a small part of its post-1977 rate increases (*i.e.*, that increase sought in the 1980 filing itself) was subject to refund during the period when the 1980 proposed rates were in effect.

The Commission's regulations clearly do not support the limitation on refund liability for which petitioner contends. The PGA regulation states that the refund obligation in connection with the triennial filing "shall be limited to the amount collected in excess of the old Base Tariff Rate." 18 C.F.R. 154.38(d)(4)(vi)(*c*). In clarifying the regulation soon after it was promulgated, the Commission stated explicitly that the refund floor would not be adjusted to take account of interim PGA adjustments (47 F.P.C. at 1511):

> It should be noted that the refund floor is the old Base Tariff Rate and is not the last effective rate (*i.e.*, the last Rate After Current Adjustment). This refund floor minimizes the possibility that companies will be able to retain revenues in excess of their cost of service and permits the extent of potential liability for refunds to be known.

See also 47 F.P.C. at 1051 (noting that the PGA regulation provides for "periodic review and investigation into the companies' total cost of service").[2]

Petitioner contends, however, that the Commission has exceeded its statutory authority in providing for calculation of refund liability with reference to the old base tariff rate, rather than the old rate as modified by intervening PGA adjustments. Petitioner cites in particular Section 4(e) of the Act, which authorizes refund of the portion of "increased rates" the Commission finds to be unjustified, and this Court's statement in *FPC* v. *Sunray DX Oil Co.*, 391 U.S.

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[2]Petitioner's suggestion (Pet. 16-17) that the language of the Commission's regulation does not support the result in this case is without merit. The regulation uses the term "Base Tariff Rate" with reference to the rate established and approved in connection with a triennial filing, not the rate as increased by subsequent PGA adjustments. Even if the regulation were ambiguous on this point, the Commission's subsequent clarification would remove any uncertainty on the part of pipelines that elect the PGA alternative.

at 24, that "an initial price which is authorized in a final, unconditional permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e)." Petitioner claims that the statute and the Court's decision stand for the principle that the Commission may not order a retroactive rate reduction below the "previously established rate" (Pet. 13) and that the six-month PGA increases constitute part of that previously established rate.

Nothing in Section 4(e) of the Act suggests that PGA adjustments automatically become part of the "initial price which is authorized in a final, unconditional permanent certificate" (391 U.S. at 24). Indeed, petitioner's contention reflects a fundamental misunderstanding of the PGA procedure. The Administrative Law Judge correctly noted that PGA clauses are an administrative creation; they constitute "a divergence from the usual ratemaking procedures * * * and are allowed only as a stop gap measure to alleviate administrative backlog and to protect pipelines against supplier rate increases without frequent general rate increase applications" (Pet. App. 23a). The PGA mechanism in no way substitutes for the "periodic review and investigation into the companies' total cost of service" (*id.* at 22a). The Eleventh Circuit recently described the relationship between PGA adjustments and the triennial filings to establish new base tariff rates:

> The Commission has a statutory duty to ensure that pipeline rates are "just and reasonable." 15 U.S.C.A. §§ 717c-717d. Although it has permitted pipelines through PGAs to pass on to consumers increases in the cost of purchased gas without regulatory review, it requires the pipelines to restate their base tariff and submit a full cost study every 36 months. * * * Through this periodic review, the Commission seeks to protect consumers from excessive rates.

South Georgia Natural Gas Co. v. *FERC*, 699 F.2d 1088, 1091 (11th Cir. 1983). See also *Florida Gas Transmission Co.* v. *FERC*, 741 F.2d 1307, 1309 (11th Cir. 1984); *El Paso Natural Gas Co.* v. *FERC*, 677 F.2d 22, 23 (5th Cir. 1982); *Panhandle Eastern Pipe Line Co.* v. *FERC*, 613 F.2d 1120, 1143 (D.C. Cir. 1979) (Wright, C.J., concurring in part), cert. denied, 449 U.S. 889 (1980).

By choosing to make PGA adjustments every six months, a pipeline knowingly avoids the full-dress review normally required to determine whether such increases would result in a just and reasonable rate. The three-year review that is required when a pipeline elects the PGA alternative ensures that the relation between the pipeline's rates and its total costs of service will not escape Commission scrutiny indefinitely as a result of the pipeline's use of the PGA mechanism. In these circumstances, it is entirely reasonable for the Commission to provide that it is the base tariff rate — *i.e.*, the last fully-reviewed rate based on the pipeline's total cost of service — that serves as the floor for calculation of refund liability; it is this rate "below which a refund cannot be ordered under § 4(e)" (*FPC* v. *Sunray DX Oil Co.*, 391 U.S. at 24) for the period when the proposed rate is in effect, but still under review. The Commission's reasonable interpretation of the statute it administers is entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 6.

2. Petitioner seeks to escape application of these principles by contending that, since it sought no increase in its purchased gas costs in connection with the Section 4 proceeding it instituted in 1980 (see Pet. 5-7), its PGA increases during the period 1977 through November 1, 1980 must be regarded as uncontested and as part of the established rate used in determining the refund floor. But that contention assumes that when the Commission examines a pipeline's total costs in connection with a triennial review it may not

take account of the effect of PGA increases since the last full review of costs. The courts of appeals have uniformly rejected such contentions.

The Eleventh Circuit, in reviewing the scope of a new base tariff rate filing made under the PGA regulations, recently stated that "all costs including the cost of purchased gas are included in the section 4 review and approval of the Base Tariff Rate." *Florida Gas Transmission Co.* v. *FERC,* 741 F.2d at 1311.[3] See also *Laclede Gas Co.* v. *FERC,* 670 F.2d 38, 41 (5th Cir. 1982) (the Section 4 rate filing "opened to Commission scrutiny the propriety of the [unchanged] PGA clause contained within its rate schedule"); *Cities of Batavia* v. *FERC,* 672 F.2d 64, 77 (D.C. Cir. 1982) (the Commission was not precluded "from reviewing a revised rate completely to assure that all its parts — old and new — operate in tandem to insure a 'just and reasonable' result and from ordering refunds if the previously approved [component] * * * operates with new provisions to produce an over-recovery").[4] These decisions

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[3] *Florida Gas Transmission Co.* v. *FERC* affirmed the decision the Commission cited as authority for rejecting petitioner's contention concerning retroactive refund liability (see Pet. App. 19a). The issue in *Florida Gas Transmission Co.* was whether a company that buys, resells, and transports gas, and that uses a PGA clause in connection with its resale rates, exposes its transportation rates (as well as its resale rates) to Commission scrutiny when it makes its required triennial base tariff rate review filing. The Eleventh Circuit affirmed the Commission's interpretation of the PGA regulation as providing that the company's transportation rates would be exposed to Commission scrutiny in such circumstances, even when those rates had remained unchanged. The court emphatically rejected the contention petitioner makes here —that only rate components a pipeline seeks to change at the triennial filing are subject to a refund obligation under the Natural Gas Act. 741 F.2d at 1311.

[4] *Cities of Batavia* involved the rate review provisions of Section 205 of the Federal Power Act, 16 U.S.C. 824d. However, that section is virtually identical to Section 4 of the Natural Gas Act; and this Court has recognized that precedent under one section is applicable to the other. *Arkansas Louisiana Gas Co.* v. *Hall,* 453 U.S. 571, 577 n.7 (1981).

are entirely consistent with the settled notion that "a natural gas company initiating an increase in rates under § 4(d) assumes the hazards involved in that procedure" (*FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 152 (1962)). The decisions indicate that PGA adjustments should not be regarded as settled components of an established, previously approved rate.

3. Petitioner's contention (Pet. 11-12) that the result below conflicts with *Distrigas of Massachusetts Corp.* v. *FERC (DOMAC)*, 737 F.2d 1208 (1st Cir. 1984), is without merit. The court in *DOMAC* merely reiterated the basic principles applicable to refund liability, as stated in Section 4 of the Act and in *FPC* v. *Sunray DX Oil Co., supra.* 737 F.2d at 1224. As we explained above, the result in this case is entirely consistent with those principles. *DOMAC* did not involve either a PGA clause or base tariff rates. Thus, the decision in that case clearly does not conflict with the result below.[5]

4. Petitioner implies (Pet. 5-7, 10-11, 15) that it has been unfairly required to disgorge amounts it collected long ago, during a time when it had no reason to believe those

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[5]Indeed, petitioner admits as much when it characterizes the issue in this case as "novel" (Pet. 9, 17).

If anything, *DOMAC* supports the result in this case. The court in *DOMAC* reviewed the Commission's interpretation of a rate settlement agreement as providing a particular refund floor. The court recognized that, in the absence of any agreement, DOMAC's refund liability would be limited to the amount of the requested rate increase. It nevertheless held that the Commission could enforce the settlement agreement, even if the result were that DOMAC would pay a larger refund amount than it otherwise would have been required to pay. 737 F.2d at 1224-1225. The PGA regulations can be viewed as creating a similar agreement. In exchange for the ability to use the PGA alternative, pipelines agree to use the base tariff rate established in the previous full review proceeding as the refund floor when their rates are reviewed. The Commission is entitled to enforce that agreement, as it did in this case.

amounts would be subject to refund. In fact, the Commission has not imposed any such liability. The order in this case does not require petitioner to refund any part of the rates it collected from 1977 to November 1, 1980 (the date when the new proposed rate went into effect following the 1980 triennial rate filing), including the amounts representing purchased gas adjustments. Even for the period after November 1, 1980, petitioner has been required to refund only a small part — 12.64 cents per Mcf — of its post-1977 PGA increases (which added up to 90.62 cents per Mcf), in addition to the 1980 proposed rate increase of 9.52 cents per Mcf. See Pet. 5-7. In any event, as we explained above (page 6 & note 2), Commission regulations put petitioner on notice that the floor for refund obligations applicable to rates charged after November 1, 1980, would be measured with reference to its 1977 base tariff rate. In these circumstances, petitioner can hardly claim that the refund order is unfair.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

I. The Commission Cannot Through Issuance of a Regulation Legislate Authority to Order Refunds Below the Pre-Existing Rate Level When That Authority Has Been Denied to It by the Natural Gas Act

In their briefs in opposition, the Federal Energy Regulatory Commission ("Commission") and the City of Winfield, Kansas, ("Winfield") do not come to grips with the pivotal issue raised by Arkansas Louisiana Gas Company ("Arkla"). The Commission argues that it correctly interpreted an ambiguous regulation (Com. Br. 5-8), contending that 18 C.F.R. 154.38(d)(4)(vi)(c) gives it the power to order refunds below the level of the rate previ-

ously in effect. But that argument does not reach the controlling issue, namely that, even assuming the Commission's interpretation were correct,[1] the Commission cannot aggrandize its statutory authority through issuance of a regulation.[2] Nowhere do the Commission or Winfield deal with that central concept or deny its validity.

Arkla's position, clearly stated in its petition, is that the Commission has no statutory authority under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. § 717c and § 717d ("Act"), to order refunds in amounts greater than the proposed increase, *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968) (Pet. 10-13), and that the Commission cannot legislate that power through issuance of a regulation. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (Pet. 13-16). See also Pet. Questions Presented. The Commission argues only that its purchased gas cost (PGA) regulation should be interpreted to provide it with authority to order retroactive refunds below the last firm rate and that its interpretation of its regulation is entitled to deference. (Br. 8). Notably, the Commission does not dispute the statutory limitation of Sections 4 and 5 of the Act as elucidated in *Sunray*, but argues that its authority derives from its regulations. Conspicuous by its absence is any attempt by the Commission or Winfield to justify a regulation that exceeds the limits of Sections 4 and 5 of the Act.

The undisputed facts are that Arkla filed for an increase of only 9.52 cents per Mcf, and the Commission suspended that increased amount only. The 90.62 cents per Mcf in PGA increases that had been filed over the previous three years had been scrutinized and permitted

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[1] Arkla has shown that the Commission's interpretation is erroneous, for the regulation, properly interpreted, is consistent with the limitation in Sections 4 and 5 of the Act which prohibits refunds below the level of the preexisting rate. (See, *infra*, 5-6; Pet. 16-17).

[2] See Pet. 13-16.

to become effective without refund obligation before the subject increase was submitted. Accordingly, under Section 4 of the Act, the Commission could order refunds only of the portion "received by reason of such [9.52-cent] increase" that it found excessive. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24. *Distrigas of Massachusetts Corp. v. FERC* ("DOMAC"), 737 F.2d 1208, 1224 (1st Cir. 1984). Any reduction below that level could be ordered only pursuant to Section 5 of the Act and could have prospective effect only from the date of the Commission's order.[3]

The Commission's argument that the regulation gives it authority not found in the statute appears based upon a premise that all PGA increases are subject to refund. Such a contention is contrary to Sections 4 and 5 of the Act and belies the Commission's own actions in accepting Arkla's PGA increases without suspension.[4] Moreover, there is nothing in the regulation that provides that each PGA filing is automatically suspended.[5] And, pursuant to

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[3] Winfield attempts to draw a distinction between rates that have been "accepted" by the Commission without contingency for refund and rates that have been "approved" after a hearing. (Winfield Br. 7-8). The distinction is without merit. Under Section 4 of the Act a filed rate that is not suspended or made subject to refund becomes the legal rate and a party "can claim no rate as a legal right that is other than the filed rate, whether it is fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). No refunds or reparations may be ordered below the filed rate level. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-579 (1981).

[4] In one instance the Commission initially suspended an Arkla PGA increase but subsequently, after further investigation, terminated the proceeding, thus making the PGA adjustment effective without refund obligation. When the Commission believes a PGA adjustment filing may be unjust and unreasonable, it is customary for the Commission to suspend the filing and make that filing subject to refund. See, Pet. 14, n. 20.

[5] Section 154.38(d)(4)(vi)(a) cited by the Commission only provides that the triennial filing shall be subject to refund, in this case the 9.52 cents per Mcf. Arkla does not dispute that fact.

Section 4(e) of the Act, the Commission may order refunds only after it has first suspended an increase.

It is in this context that the Commission's regulation violates *Sunray*, which unmistakably holds that:

> [I]t would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all.[6]

This rationale is emphasized in *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), where the court noted that this Court in *Sunray* reached its conclusion not only from the language of the Act, but also from the fact "that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one." 737 F.2d at 1224.[7]

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[6] The Commission suggests (Com. Br. 4, 11) that it was liberal in ordering a refund of only 12.64 cents per Mcf, implying that it could order a refund of the entire 90.62 cents of the PGA adjustments. Such an argument points up the fallacy of the Commission's position. It is simply inconceivable that the PGA regulation can be read as empowering the Commission to order refunds of all the PGA adjustments going back three years where the PGA adjustments have not been challenged and have been permitted to go into effect without suspension or refund obligation. Under the Commission's theory, Arkla could be denied recovery of its entire cost of service. Since Arkla must pass its purchased gas cost adjustments directly back to its suppliers, those funds are not available to Arkla and a requirement that Arkla "refund" the 90.62 cents would deny Arkla any recovery of the entire remainder of its cost of service. Since the validity of the entire three-year increase in PGA adjustments (90.62 cents per Mcf) is uncontested, the Commission requirement that Arkla refund 12.64 cents per Mcf more than the amount of its proposed increase, necessarily results in a retroactive reduction in recovery of a portion of the cost of service that the Commission had previously held to be just and reasonable.

[7] The Commission's attempt (Com. Br. 10, n. 5) to analogize a settlement agreement in DOMAC with an implied agreement on the part of Arkla here is specious. No such agreement, express or implied, can be imputed to Arkla on the facts of this case. Section 154.38(d)(4)(vi)(a) alluded to by the Commission as the source

Neither the Commission nor Winfield has faced up to the core issue whether the Commission may arrogate to itself the authority to do by its own regulation that which is proscribed by the Act. The reason, of course, is that there is no answer to such unwarranted assertion of power.[8]

II. Properly Interpreted, the PGA Regulation Does Not Authorize Refunds of Amounts in Excess of the Proposed Increase

The Commission seeks to bypass the retroactive refund issue with a contention that the triennial filing provides the Commission with the opportunity to scrutinize all of a pipeline's costs and revenues. (Com. Br. 8). But that analysis has nothing to do with the issue raised here, whether, after the Commission has completed the balancing of costs and revenues, there is a "floor" below which the Commission may not order refunds under Section 4 of the Act, as defined by *Sunray*.

Aside from the fact that the Commission cannot clothe itself with refund power proscribed by the Act, the language of the Commission's PGA refund provision, which is a regulation purporting to give effect to Section 4 of the Act, does not support the Commission's reading (Com. Br. 6).[9] In the case at hand, the Commission sus-

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of Arkla's agreement that its triennial filing is subject to refund greater in amount than the filed increase provides only that the triennial increase—9.52 cents per Mcf—was subject to refund.

[8] Winfield's contention that the issue has "received full consideration by four different decision-makers" (Winfield Br. 8) is inaccurate. Neither the ALJ, the Commission, nor the court below cited or referred to *Sunray* in the disposition of this proceeding. Each of the decision-makers below assumed the validity of the Commission's PGA regulations, without analysis of Arkla's express contentions that the PGA regulations exceeded the Commission's statutory authority as defined in *Sunray*.

[9] The Commission acknowledges that the regulation as adopted is different from the text of Order No. 452-A at 47 F.P.C. at 1511. See Opinion No. 160-A, Pet. App. 19a, n. 2.

pended Arkla's proposed increase of 9.52 cents, but did not, and at that time, could not, suspend the PGA adjustments that were being collected without refund obligation. Section 154.38(d)(4)(vi)(c) of the PGA regulation dealing with refunds of triennial filings provides only that a company shall, after balancing of costs and revenues, refund "any excess amounts *collected subject to refund.*" (Emphasis added).[10] Since only Arkla's 9.52-cent increase was subject to refund and the three-year accumulation of PGA adjustments were never suspended or made subject to refund, the refund requirement referred to in the regulation cannot reasonably be held to apply to the PGA adjustments. Subsequent language in the regulation which refers to a limitation on "[T]his refund obligation" refers directly back to the "amounts collected subject to refund," and in no way broadens the scope of Commission authority. See Pet. 16-17.

Moreover this reading of the regulation is consistent with the limitation in Sections 4 and 5 of the Act and *Sunray* which holds that the potential refund obligation is limited to "the amounts received by reason of such increase." 391 U.S. at 24. Read in terms of the Commission's limited refund authority as defined in *Sunray*, the regulation is not ambiguous as the Commission assumes (Com. Br. 6, n. 2) so that the Commission's asserted clarification is unnecessary and contrary to law.

III. Other Arguments of the Commission and Winfield Are Without Merit

Contrary to the position it takes before this Court (Com. Br. 9), the Commission in the *Florida Gas* case[11] told the Eleventh Circuit that *Florida Gas* is irrelevant to the issue presented in the case at bar. In its brief to the Eleventh Circuit the Commission represented that:

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[10] See Pet. App. 37a for full language of the regulation.

[11] *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984).

> Petitioner's [Florida Gas] other arguments are equally without merit. These arguments, involving the filed rate doctrine, precepts against retroactive ratemaking, and the rule that the last clean rate places a limit on refund liability,[21] all beg the fundamental question presented in this case—whether the restated Base Tariff Rate included the Company's transportation rates. Given the Commission's finding that the Base Tariff Rate did include these rates, the arguments raised by the petitioner under these principles are beside the point.[12]

[21] *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

As the Commission stated in the quotation above, the issue raised in *Florida Gas* was whether the restated base tariff rate included the company's transportation rates as well as its resale rates. On this narrow issue, the Eleventh Circuit affirmed the Commission's holding that the base tariff rate is a composite of all rates, transportation as well as resale. The court did not cite nor address the *Sunray* decision, inasmuch as under the composite tariff rate holding, the issue of refunds of transportation revenues, separate and apart from the composite of all rates, did not arise. 741 F.2d at 1311. On the other hand, in the case at bar the issue is whether the Commission can nullify the *Sunray* doctrine by requiring Arkla to make retroactive refunds below 168.73 cents per Mcf, the firm rate in effect prior to Arkla's request for an increase.

Winfield notes (Winfield Br. 12) that in *DOMAC* the Commission limited refunds to an amount unaffected by any "tracking provisions." The reason for such a limitation by the Commission does not appear in the opinion, as no issue respecting any tracking provision was raised in

[12] Brief for Respondent, Federal Energy Regulatory Commission, *Florida Gas Transmission Co. v. FERC*, No. 82-6041, 11th Cir. at page 25.

that case. It may be noted however that DOMAC has a PGA clause in its tariff and that the First Circuit denied an intervenor's claim that the Commission could order refunds greater than the amount of the increase involved. 737 F.2d at 1222-1224. The existence of PGA increases did not provide a basis for further refunds. Applied to this case, *DOMAC* limits refunds to the 9.52 increase, exclusive of PGA adjustments.

CONCLUSION

The Interstate Natural Gas Association of America, ("INGAA") which represents virtually all major interstate natural gas transmission companies in the United States, nearly all of whom have PGA clauses in their tariffs, has filed a motion as *amicus* in this case in recognition that the opinion of the court below would adversely affect the entire interstate natural gas pipeline industry by nullifying *Sunray*.

For all the foregoing reasons and for the reasons stated in its petition, Arkla requests that a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

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Dated at Washington, D.C. this 31st day of January, 1985.

MOTION FILED
DEC 6 1984

No. 84-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas
KN Energy, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
MidCon Corporation
Mid Louisiana Gas Company
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Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Co.
Panhandle Eastern Corporation
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Southern Natural Gas Company
Tennessee Gas Transmission Company
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Interstate Natural Gas Association of America

ASSOCIATE MEMBER COMPANIES:

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Arkansas Louisiana Gas Company
Atlanta Gas Light Company
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Union Oil Co. of California

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Respondent.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America (INGAA)* moves for leave to file the accompanying brief amicus curiae. This motion is necessary because counsel for one party to this proceeding, the Cities of Winfield, Kansas and Mangum, Oklahoma refused

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* INGAA's member companies are listed on the inside cover and the cover's facing page of this motion and brief.

to consent to the filing of such brief. All other parties have consented, as evidenced by the letters of consent filed with the Clerk in this docket.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. § 7101, *et seq.*) and the Natural Gas Policy Act (15 U.S.C. § 3301, *et seq.*).

The rates of all of these companies are set by the Federal Energy Regulatory Commission pursuant to Sections 4 and 5 of the Natural Gas Act (15 U.S.C. §§ 717c and 717d). Purchase gas adjustment (PGA) filings are made by most on either an annual or a semiannual basis. The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case would adversely affect the entire interstate natural gas pipeline industry by unlawfully imposing a retroactive reduction below a pipeline's previously established just and reasonable rate. This opinion is in conflict with the opinion of this Court in *FPC* v. *Sunray DX,* 391 U.S. 9 (1968) and the United States Court of Appeals in *Distrigas of Massachusetts Corp.* v. *FERC,* 737 F.2d 1208 (1st Cir. 1984).

The interests of the interstate natural gas transmission industry in this proceeding are relevant to

the disposition of the petition for a writ of *certiorari* by this Court and cannot adequately be represented by any party other than INGAA.

WHEREFORE, INGAA respectfully requests this Court to grant it leave to file a Brief Amicus Curiae in support of Petitioner.

Respectfully submitted,

JOHN H. CHEATHAM, III

December 6, 1984

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IN THE

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ARKANSAS LOUISIANA GAS COMPANY,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

This amicus curiae brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of the Arkansas Louisiana Gas Company (ARKLA).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported. Styled as *Arkansas Louisiana Gas Co.* v.

FERC, that Opinion was issued and judgment rendered on June 14, 1984, and rehearing was denied on August 9, 1984 in Case No. 83-1548. The orders of the Federal Energy Regulatory Commission (FERC) are reported at 22 FERC ¶ 61,125 (1983); rehearing denied 23 FERC ¶ 61,030.

JURISDICTION

INGAA incorporates by reference the jurisdictional statement set forth in ARKLA's Petition for a Writ of Certiorari at 3.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major interstate natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, et seq.), the Department of Energy Organization Act (42 U.S.C. § 7101, et seq.) and the Natural Gas Policy Act (15 U.S.C. § 3301, et seq.).

The rates of all of these companies are set by the Federal Energy Regulatory Commission pursuant to Sections 4 and 5 of the Natural Gas Act (15 U.S.C. § 717c and 717d. Purchase gas adjustment (PGA) filings are made by most on either an annual or a semiannual basis. The opinion of the United States Court of Appeals for the District of Columbia Circuit in this case would adversely affect the entire interstate natural gas pipeline industry by unlawfully imposing a retroactive reduction below a pipeline's

previously established just and reasonable rate. This opinion is in conflict with the opinion of this Court in *FPC* v. *Sunray DX,* 391 U.S. 9 (1968) and the United States Court of Appeals in *Distrigas of Massachusetts Corp.* v. *FERC,* 737 F.2d 1208 (1st Cir. 1984).

SUMMARY OF ARGUMENT

The Petition For Writ of Certiorari filed by ARKLA should be granted, and the *per curiam* memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit herein should be reversed, because:

1. Such Opinion is in conflict with a decision of the Supreme Court of the United States.

2. Such Opinion is in conflict with decisions of another federal court of appeals on the same issue.

3. Such Opinion presents the issue of whether the Commission, in implementing its regulations pertaining to purchase gas adjustment clauses (PGA) under the Natural Gas Act, can do what is forbidden by statute, *i.e.,* order a retroactive reduction below a pipeline's previously established just and reasonable rate.

BACKGROUND AND ARGUMENT

The facts are simple. A natural gas pipeline company—Arkansas Louisiana Gas Company (ARKLA) —had rates in effect in 1980 and filed a routine application with the FERC pursuant to Section 4 of the Natural Gas Act to increase them. The rate in effect was approximately $1.69 per thousand cubic feet of gas

(Mcf), and it was a lawful rate, having been previously approved by the FERC. The proposed increased rate was approximately $1.78 per Mcf. The FERC routinely suspended such rate, pending investigation, and it thus became effective, subject to possible refund, on November 1, 1980. On February 4, 1983, after hearings, the FERC ordered that the proper rate was 156.09 cents or approximately $1.56 per Mcf—lower than both the previously effective rate and, of course, the proposed increased rate. *Arkansas Louisiana Gas Company, A Division of Arkla, Inc.*, 22 FERC ¶ 61,125, *rehearing denied* 23 FERC ¶ 61,030 (1983).

If the FERC had determined that the previously approved rate of $1.69 per Mcf (and the proposed new rate) were unjust and unreasonable, it could have set a lower just and reasonable rate and made it effective *from the date of such order*—February 4, 1983. Here, however, the FERC reduced the new rate below the previously approved rate *and made that reduction effective as of November 1, 1980.* This was clear error because it constitutes retroactive ratemaking prohibited by the Natural Gas Act.

Under Section 4(e) of the Natural Gas Act (15 U.S.C. § 717(c)), when a natural gas company files an increased rate, the FERC can suspend the proposed rate for a period of five months. If the FERC's hearing to determine the justness and reasonableness of the rate has not concluded within that five month period, the rate can be collected subject to refund as of the date it goes into effect.[1] But as to the period

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[1] See, *Hope Natural Gas Company* v. *Federal Power Commission*, 196 F.2d 803 (4th Cir. 1952).

from the date such proposed increased rate is put into effect subject to refund (here, the rate of $1.78, put into effect on November 1, 1980) until the new rate is ordered (here, the rate of $1.56, ordered February 4, 1983), the amount which can be ordered refunded is limited to the difference between the rate sought ($1.78) and the rate previously in effect ($1.69). This stems from the provisions of Section 4(e) of the Natural Gas Act, which allow the FERC "to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified."

In *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), this Court, dealing with a natural gas company which was a producer of gas, construed Section 4(e) of the Natural Gas Act and held that the potential *refund* obligation is limited to "the amounts received by reason of such increase." This Court said that:

> It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and does not expressly limit the refund to the rate increase or increment. *However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase.' If it had been intended that the refund obligation should extend to greater amounts the accounting requirement logically should have extended to them also.* Viewing the Act more broadly, there is another reason by this interpretation of § 4(e) is preferable. It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase its price, the Commission may not order it to make refunds

> simply because the just and reasonable rate for its area turns out to be below the in-line price. This would amount to a reparation order, and this Court has repeatedly held that the Commission has no reparation power. *It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all.* We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e). (emphasis added) (footnote omitted) (*Id.* at 24)

Immediately prior to the above quotation from *Sunray DX,* this Court said at 391 U.S. 23:

> It has *sometimes been contended* that when a producer operating under a nonreviewable permanent certificate increases its price under § 4, the permanently certificated price is not a lower limit on the refund power, and that if the eventual just and reasonable area rate is below the permanently certified price, the Commission may order a *refund not merely of the price increase but of the entire difference between the increased rate and the just and reasonable rate. The Commission has never passed on this contention, and this Court has twice rejected it in dictum.* In Sunray Mid-Continental Oil Co. v. FPC, 364 U.S. 137, 146, 4 L Ed 2d 1623, 1630, 80 S Ct 1392, the Court interpreted § 4(e) as meaning that 'the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase.' In *Callery,* supra, the Court stated that '[t]he fixing of an initial 'in-line' price establishes a firm price at which a producer may operate, pending determination of a just and

> reasonable rate, without any contingent obligation to make refunds should a just and reasonable rate turn out to be lower than the 'in-line' price.' 382 U.S. at 227, 15 L Ed 2d at 288. (emphasis added) (footnote omitted)

The Court went on to state that ". . . *We adhere to the dicta in Callery and Sunray Mid-Continent.* That outcome comports better with the language of § 4(e) than does the alternative." (emphasis added) (391 U.S. 23)

It is thus clear that while the FERC could order ARKLA to refund the difference between $1.78 and $1.69, it exceeded its statutory power in ordering a refund down to $1.56, which is below the previously approved rate. In the instant proceeding, part of the effective underlying rate of $1.69 was the result of PGA increases obtained pursuant to Section 4 of the Natural Gas Act. Rate increases pursuant to Section 4 must be just and reasonable.[2] PGA increases are related to one cost factor—the price of gas. Since ARKLA's PGA increases were approved by the Commission, they have been found to be just and reasonable. However, the Commission's ruling hereinbelow has sought to ignore that fact, treat such increases as conditional, and, thereby retroactively reduce the

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[2] Section 4(a) of the Natural Gas Act provides specifically:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, *shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.* (emphasis added)

previously approved rates. There is no statutory foundation for this.

In *Distrigas of Massachusetts Corp., et al.* v. *FERC*, 737 F.2d 1208 (1984), the Court of Appeals for the First Circuit cites and relies on this Court's above quoted decision in *Sunray DX*, whereas the District of Columbia Circuit in its memorandum decision herein, issued the same date, cites *no* cases in its two paragraph discussion of the issue. The First Circuit said:

> The Commission's power to order refunds comes from section 4(e) of the Natural Gas Act, 15 U.S.C. § 717c(e) . . . . That section deals with rate *increases* that a regulated firm proposes. It provides that, after five months, these increases shall take effect on the firm's motion. While Commission review proceedings continue, the Commission can require the firm to 'keep accurate accounts in detail of all amounts received by reason of such increase . . . .' Upon completion of the review proceedings, the Commission may order the firm 'to refund, with interest, the portion of such increased rates or charges by its decision found not justified.' The Supreme Court has specifically stated that the pre-existing lawful rate provides a refund floor in a section 4 proceeding. *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 22-25 88 S Ct 1526, 1533-1535, 20 L Ed 2d 388 (1968). It derived this conclusion from the language of the statute and from the fact that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one. And, ironically, the firms least likely to be earning monopoly profits would be the firms most exposed to past rate scrutiny (for they are the firms most likely to see a need to ask for a rate increase).

> We find Boston Gas's efforts to distinguish *Sunray* unconvincing. The Supreme Court's language clearly interprets section 4's refund authority as limited to the 'amounts received by reason of such *increase.*' 15 U.S.C. § 717c(e) (emphasis added). We also find the logic of *Sunray* convincing and note that it is broadly consistent with the traditional language of similar statutes in the ratemaking area. *Cf. Commonwealth of Massachusetts, Department of Public Utilities* v. *United States,* 729 F.2d 886 (1st Cir. 1984) (listing similarly structured statutes). But, of course, we would be bound by *Sunray* even were this not so. (737 F.2d 1224).

Thus, the First Circuit not only recognizes it is bound by this Court's decision in *Sunray DX,* but also expressly agrees with the logic of, and precedential support for that decision. In contrast, the D.C. Circuit's decision hereinbelow, ignores this Court's decision in *Sunray DX* and is in conflict with the First Circuit's decision in *Distrigas.*

Accordingly, it is respectfully submitted that certiorari should be granted and the D.C. Circuit's decision below, reversed. That decision, and the underlying FERC decision, attempt to avoid the force of the above quoted interpretation of the Natural Gas Act by contending that ARKLA's $1.69 filed rate, which was superseded by the proposed increase (to $1.78), is not the refund floor because it was approved in a "PGA" proceeding by the FERC, rather than an all costs proceeding. But that ignores the fact that in both such types of rate proceedings, the FERC approves rates as being just and reasonable under the Natural Gas Act, and thus suitable for use and no longer subject to refund. That approval

for ARKLA established the $1.69 rate as the rate which was being increased, and thus the *floor* for refunds under Section 4 of the Natural Gas Act, as interpreted by this Court in *Sunray DX* and the First Circuit in *Distrigas*.

The attempt by the FERC to change that statutorily mandated result by reliance on its own internal practices and regulations is invalid and merits summary reversal. At the least, it merits full examination upon brief and argument. Every natural gas pipeline company periodically (every year or two) files for rate changes and the question of the extent of their maximum refund exposure is raised. This is the first time the FERC has attempted to impose a refund obligation below the level of the superseded rate. That practice should be reversed now, as inconsistent with the Natural Gas Act and the holdings of this Court and the First Circuit. Such action will allow orderly administration of the Natural Gas Act and will preclude multiple appeals to the various United States Court of Appeals of the same question by other pipeline companies and *amicus curiae*. Such appeals will result inevitably when the holding below is applied to them, if it is not reversed here.

CONCLUSION

It is respectfully requested that this Court grant the Petition For Writ of Certiorari by ARKLA and reverse the erroneous decision of the Court of Appeals for the District of Columbia Circuit.

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